SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 32

THE JOHN K. & CATHERINE S. MULLEN BENEVOLENT CORPORATION, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

No. 731

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, a Corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

PORTIONS OF PETITION FILED NOV. 25, 1929

* * * * * * *

5

That heretofore and under date of July 15th, 1915, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 69, which said ordinance was an ordinance authorizing and providing for the issuance, execution, sale and delivery of special assessment sewerage improvement bonds in the aggregate principal sum of $24,000.00, to provide funds for the construction of a sewerage system and sewerage disposal works in and for Local Sewerage Improvement District No. 1 of the City (then Village) of American Falls, Power County, Idaho; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments there-[fol. 8] for, sufficient to pay the interest accruing upon said bonds and the principal thereof, according to their tenor and effect.

* * * * * * *

9

That heretofore and under date of June 6th, 1916, the said City (then Village) of American Falls, a municipal corporation of the State of Idaho, duly and regularly en-

acted its Ordinance No. 74, which said ordinance was an ordinance creating and establishing Local Sewerage Improvement District No. 2 of said American Falls, and providing for the construction of a gravity sewerage system and sewerage disposal work in said improvement district, and further providing for the payment of such assessments; that, under date of August 1, 1916, and in regular course, said municipality duly and regularly enacted its Ordinance No. 79, approving and confirming the proceedings in making the assessment for the construction of a sewer system and a sewerage disposal works in Local Sewerage Improvement District No. 2, and approving and confirming the assessment roll prepared by the sewer committee and the committee on streets, and the assessment levied by vote thereof on the property in Local Sewerage Improvement District No. 2, in the Village of American Falls, County of Power, State of Idaho, and providing for the payment of such assessment in ten equal installments, [fol. 9] and interest thereon at six per cent; that under date of December 9th, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 83, which said ordinance was an ordinance authorizing and providing for the issuance, execution, sale and delivery of special assessment sewerage improvement bonds in the aggregate principal sum of $7,150.00, to provide funds for the construction of a sewerage system and sewerage disposal works in and for Local Sewerage Improvement District No. 2 of the City (then Village) of American Falls, Power County, Idaho; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments therefor, sufficient to pay the interest accruing upon said bonds and the principal thereof, according to their tenor and effect.

* * * * * * *

13

That heretofore and under date of June 7th, 1916, the said City (then Village) of American Falls, a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 75, which said ordinance was an

ordinance creating and establishing Local Improvement District No. 8 of said American Falls, and providing for the construction of cement sidewalks and cross walks in said [fol. 10] improvement district, and further providing for the payment of such assessments; that under date of September 6th, 1916, and in regular course, said municipality duly and regularly enacted its Ordinance No. 80, approving and confirming the proceedings in ranking the assessment for the construction of cement sidewalks and cross walks in Local Improvement District No. 8, and approving and confirming the assessment roll prepared by the improvement committee and the committee on streets, and the assessment levied by vote thereof on the property in Local Improvement District No. 8, in the Village of American Falls, County of Power, State of Idaho, and providing for the payment of such assessment in ten equal installments, and interest thereon at seven per cent; that under date of December 9th, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 84, which said ordinance was an ordinance authorizing and providing for the issuance, execution, sale and delivery of special assessment improvement bonds in the aggregate principal sum of $21,526.05, to provide funds for the construction of cement sidewalks and cross walks in and for Local Improvement District No. 8 of the City (then Village) of American Falls, Power County, Idaho; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levy [fol. 11] ing and collection of special assessments therefor, sufficient to pay the interest accruing upon said bonds and the principal thereof, according to their tenor and effect.

. . . . . .

18

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain and without making any com-

pensation whatever to this plaintiff, took absolute, permanent and exclusive possession, title and control of all the real property within said Local Sewerage Improvement District Nos. 1 and 2, and within said Local Improvement District No. 8, for a public use and purpose, to-wit, for a Carey Act storage reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts and inundated and permanently flooded the land embraced within said sewerage and improvement districts, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and [fol. 12] only method of enforcing the payment of the assessments and bonds aforesaid.

* * * * * * * *

IN UNITED STATES DISTRICT COURT

SECOND AMENDED PETITION—Filed Oct. 27, 1930

Comes now the plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, and as and for its Second Amended Petition against said defendant, complains and alleges as follows, to-wit:

1

That the plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal place of business at Denver, Colorado, and is now, and since the date of its incorporation has been, a citizen and resident of the State of Colorado.

2

That during all the times hereinafter mentioned, the defendant has been, and now is, The United States of America.

3

That at all times hereinafter mentioned, the Village, now City, of American Falls, has been, and now is, a municipal [fol. 13] corporation of Power County, State of Idaho, and as such city and such village has all the powers incident to, and vested in, a municipal corporation of the State of Idaho.

4

That this action involves a claim against the Government of the United States, for an amount less than $10,000.00, upon an implied contract for compensation.

5

That heretofore and under date of February 23rd, 1915, the City of American Falls (then Village), a municipal corporation of the State of Idaho, regularly enacted its certain ordinance of intention to organize a sewerage district to be known as Local Sewerage Improvement District No. 1 of said village, and to construct a sewerage system and disposal works in said district, and to issue bonds for the payment of the cost and expense thereof; that in accordance with said ordinance and under date of March 18, 1915, said village regularly enacted its Ordinance No. 55, which was an ordinance creating and establishing Local Sewerage Improvement District No. 1 in said village, and providing for the appointment of a sewerage committee, the construction of said sewerage system and for the assessment of the cost and expense thereof against the property in said District No. 1; that in regular course the [fol. 14] assessments provided for in said Ordinance No. 55 were duly levied and an assessment roll containing the names of the owners, description of the property in separate parcels, and the amount of the assessment thereon against said parcels of property was duly certified to and filed, and notice thereof was published as provided by statute, said notice having been published in two issues of the weekly newspaper in said village; that under date of July 6th, 1915, said village regularly enacted its Ordinance No. 66, which was an ordinance approving and confirming the proceedings in making the assessment for the construction of said system, confirming the assessment roll, and providing for the payment of such assessments in ten equal

installments, with interest thereon at the rate of seven per cent per annum; that under date of July 6th, 1915, said village regularly enacted its Ordinance No. 64, which was an ordinance amending said ordinance of intention to create the district, in certain minor particulars; that under date of July 6th, 1915, said village regularly enacted its Ordinance No. 65, which was an ordinance amending said Ordinance No. 55 in certain minor particulars; that under dates of July 15th and 22nd, 1915, said village regularly published notice of the filing of the above mentioned assessment roll and notice of the confirmation of the levies made thereunder, and appointing the time and place when and where objections might be made; that under date of Oc [fol. 15] tober 7th, 1915, said village regularly enacted its Ordinance No. 68, which was an ordinance amending certain portions of said Ordinance No. 66; that under date of October 7th, 1915, the said Village of American Falls regularly enacted its Ordinance No. 69, which was an ordinance authorizing and providing for the issuance and sale of special assessment sewerage improvement bonds in the aggregate principal sum of $24,000.00, to provide funds for the construction of said system, and said ordinance prescribed the form and date of the bonds, the time of payment thereof, and provided for the levying and collection of special assessments which were then calculated as sufficient to pay the principal and interest of said bonds in accordance with their tenor and effects, but that the levies and assessments so made, through mistake or inadvertence, were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, according to their terms and provisions, or at all.

6

That in accordance with the authority contained in said Ordinance No. 69, the said Village of American Falls issued, under date of July 15th, 1915, its twenty four certain special assessment sewerage improvement bonds for District No. 1, numbered consecutively from 1 to 24, both inclusive, of the denomination of $1,000.00 each, and that said bonds were due and payable on or before July 15th, [fol. 16] 1925, and bore interest at the rate of seven per cent per annum.

7

That thereafter and in regular course of business, before the maturity date of said bonds, one John K. Mullen purchased and acquired certain of said bonds, to wit: Bonds No. 21, 22, 23 and 24, paying therefor the full face value of said bonds, and that thereafter and in the regular course of business, and for value, said John K. Mullen sold, transferred and set over to this plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, the bonds aforesaid, and that this plaintiff is now the owner and holder of the same, and has not sold, or transferred or parted with title to said bonds, or either of them, and is now the lawful owner and holder of said four bonds, and each of them; and that no part of said four bonds, or either of them, has been paid, except the interest thereon to April 28, 1927, and there is now due, owing and unpaid to this plaintiff on account thereof the sum of $4,000.00, with interest thereon at the rate of seven per cent per annum from and after April 28, 1927, and the whole thereof.

8

That said bonds are identical in form and substance, excepting for numbers, and that said bond No. 21 was and is in the following words and figures, to wit:

[fol. 17] "Number 21. Dollars 1,000

State of Idaho, County of Power, Village of American Falls

Special Assessment Sewerage Improvement Bond, District No. 1

Know all men by these presents that the Village of American Falls, of Power County, Idaho, acknowledges itself to owe, and, for value received, hereby promises to pay to the bearer hereof the principal sum of one thousand dollars on or before July 15, A. D. 1925, together with interest on said sum from the date hereof until paid, at the rate of seven (7) per centum per annum, payable semi-annually on the fifteenth days of January and July, respectfully, in each year, as evidenced by and upon the presentation and surrender of the interest coupons hereto attached as they

severally become due; and both the said interest on and principal of this bond are hereby made payable in lawful money of the United States of America at the National Bank of Commerce, in the City and State of New York, U. S. A., out of the local improvement fund heretofore created for the payment of the costs and expenses of the improvement in Local Sewerage Improvement District No. 1, in said village and not otherwise.

[fol. 18] This bond is issued by said village for the purpose of providing funds for the payment of the costs and expenses of said sewerage system and sewerage disposal works in and for said Local Sewerage Improvement District No. 1, pursuant to, under, by virtue of and in all respects in full and strict compliance with the constitution and Chapter 80, Session Laws of Idaho of 1911, being an Act entitled: 'An Act amending Section 2353 of the Political Codes of Idaho, relating to assessment and bond issue for sewerage improvement; and declaring an emergency', passed by the legislature of said state at its 1911 session and approved March 13, 1911, and all laws of said state supplementary thereto and amendatory thereof.

And it is hereby certified, recited and warranted, That said village is now and for some years past has been a village of said state, and body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho and the ordinances of said village to exist and to happen and be done and performed precedent to and in the creation of the said Local Sewerage Improvement District No. 1 and the construction of a sewerage system and sewerage disposal works therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said village, and payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the total costs and [fol. 19] expenses of said improvements have been duly levied and assessed as special assessments for sewerage improvements upon all of the lands, lots, and pieces and parcels of land in said Local Sewerage Improvement District No. 1, separately and in addition to all other taxes, and said special assessments are a lien upon said lands, lots, and pieces and parcels of land, and take precedence

of all other liens; that due provision has been made for the collection of said special assessments and for the levy and collection of a direct annual tax, sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity.

In conformity with Subdivision 15, Chapter 80 of said Session Laws of 1911, it is hereby recited that "the holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued, in any event, except for the collection of the special assessment made for the work of improvement for which said bond was issued, but this remedy, in case of non-payment, shall be confined to the enforcement of said assessment. A copy of this subdivision shall be plainly written, printed, or engraved upon the face of each bond so issued".

This bond is redeemable by said village on any interest payment date upon call of the treasurer of said village, made prior thereof by publication for thirty days in the official newspaper, following the delinquency of any installment of the assessment.

[fol. 20] In testimony whereof The Village of American Falls, of Power County, Idaho, by its board of trustees, has caused this bond to be signed by the mayor of said village, and attested by the clerk thereof, sealed with the corporate seal of said village, and recorded by said clerk; and each of the twenty interest coupons hereto attached to be signed by the engraved facsimile signatures of the said mayor and clerk, the fifteenth day of July, A. D. 1915.

(Signed) H. C. Wones, Mayor.

Recorded.

(Signed) O. F. Crowley, Clerk. (Seal.)

Attest: O. F. Crowley, Clerk."

9

That under date of May 9th, 1916, said City of American Falls (then Village), a municipal corporation of the State of Idaho, regularly enacted its Ordinance No. 68, which was an ordinance of intention to organize Local Sewerage Improvement District No. 2 of said village, and to construct a sewerage system therein, and to issue bonds for the payment of the cost and expense thereof; that under date of

June 6th, 1916, said village regularly enacted its Ordinance No. 74, which was an ordinance creating and establishing Local Sewerage Improvement District No. 2 of said village, providing for the construction of a sewerage system [fol. 21] therein, and providing for assessing the cost thereof against the property in said district; that in accordance with the provisions of said Ordinance No. 74, an assessment roll of the property within said improvement district was certified to and filed, which contained the names of the property owners, a description of the property in separate parcels and the amount of the assessment against each particular parcel of land; that notice of the filing of such assessment roll was given in the statutory manner; that under date of August 1st, 1916, said village regularly enacted its Ordinance No. 79, which was an ordinance approving and confirming the proceedings had in the making of such assessments, and providing for the payment of such assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum; that under date of December 9th, 1916, said village regularly enacted its Ordinance No. 83, which was an ordinance authorizing and providing for the issuance and sale of special assessment sewerage improvement bonds of said district in the aggregate principal sum of $7,150.00, to provide for the construction of said sewerage system within said District No. 2; that the latter ordinance prescribed the form and date of the bonds, the time and payment thereof, and provided for the collection of special assessments, then calculated as sufficient to meet the principal and interest of said bonds, but that the levies and [fol. 22] assessments so made, through mistake or inadvertence, were not in fact sufficient to pay principal and interest on said bonds as the same became due and payable, according to their terms and provisions, or at all.

10

That in accordance with the authority contained in said Ordinance No. 83, the said Village of American Falls issued, under date of August 1st, 1916, its fifteen certain special assessment sewerage improvement bonds for District No. 2, numbered consecutively from 1 to 15, both inclusive, the first fourteen being each in the amount of $500.00

and the fifteenth bond being of the denomination of $150.00, and that said bonds were due and payable on or before August 1st, 1920, and bore interest at the rate of seven per cent per annum.

11

That thereafter and in regular course of business, before the maturity date of said bonds, one John K. Mullen purchased and acquired certain of said bonds, to wit: Bonds Nos. 12, 13, 14 and 15, paying therefor the full face value of said bonds, and that thereafter and in the regular course of business, and for value, said John K. Mullen sold, transferred and set over to this plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, the bonds aforesaid, and that this plaintiff is now the owner and holder of the same, and has not sold, or [fol. 21] transferred or parted with title to said bonds, or either of them, and is now the lawful owner and holder of said four bonds, and each of them; and that no part of said four bonds, or either of them, has been paid, except the interest thereon to October 25, 1920, and $198.60 on the principal thereof, and there is now due, owing and unpaid to this plaintiff on account thereof the sum of $1,351.11 with interest thereon at the rate of seven per cent per annum from and after October 25th, 1920, and the whole thereof.

12

That said bonds are identical in form and substance with the form of bond set out above in paragraph 8, with the exception that the same were issued against the funds of said District No. 2, were dated and became due on different dates and bore different numbers, as shown above.

13

That under date of May 2nd, 1916, said Village of American Falls regularly enacted its ordinance of intention to create and establish Local Improvement District No. 8 within said village, for the construction of cement walks upon certain specified portions of said district; that under date of June 7th, 1916, said village regularly enacted its Ordinance No. 75, which was an ordinance creating and establishing Local Improvement District No. 8 within said

village, which ordinance described the property to be in [fol. 24] cluded within the district and provided for the construction of cement sidewalks and cross walks upon portions thereof; that in accordance with the provisions of the latter ordinance, the village officials made out, certified to and filed an assessment roll, stating the name of the owners of each parcel of land within the district, describing such parcels of land separately, fixing the rate of the assessment and the total amount thereof as against each parcel of said land; that notice of the filing of said assessment roll was given in the manner provided by statute; that under date of September 6th, 1916, said village regularly enacted its Ordinance No. 80, which was an ordinance approving and confirming the proceedings had in establishing said Improvement District No. 8, in making said assessments and approving and confirming the assessment roll as so prepared and filed, and the assessments levied thereunder as against the property within said district, and providing for the payment of said assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum; that under date of December 9th, 1916, said village regularly enacted its Ordinance No. 84, which was an ordinance authorizing and providing for the issuance and sale of special assessment improvement bonds of said district in the aggregate principal sum of $21,526.05 to provide for the payment of the cost and expense of the creation of said district and the construction of said im- [fol. 25] provements, which ordinance further provided for the form and sale of said bonds and the time of payment thereof, and further for the collection of the special assessments then calculated as sufficient to pay the principal and interest of said bonds as and when the same matured, but that the levies and assessments so made, through mistake or inadvertence, were not in fact sufficient to pay the principal and interest of said bonds as the same became due and payable, according to their terms and provisions, or at all.

14

That in accordance with the authority contained in said Ordinance No. 84, the said Village of American Falls issued, under date of September 1st, 1916, its forty-three certain special assessment improvement bonds for District

No. 8, numbered consecutively from 1 to 43, both inclusive, each bond so mentioned in next paragraph being of the denomination of $500.00, and that said bonds were due and payable on or before September 1st, 1926, and bore interest at the rate of seven per cent per annum.

15

That thereafter and in regular course of business, before the maturity date of said bonds, one John K. Mullen purchased and acquired certain of said bonds, to-wit: Bonds No. 38, 39, 40, 41, 42 and 43, each in the principal sum of [fol. 26] $500.00, paying therefor the full face value of said bonds, and that thereafter and in the regular course of business, and for value, said John K. Mullen sold, transferred and set over to this plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, the bonds aforesaid, and that this plaintiff is now the owner and holder of the same, and has not sold, or transferred or parted with title to said bonds, or either of them, and is now the lawful owner and holder of said six bonds, and each of them; and that no part of said six bonds, or either of them, has been paid, except the interest thereon to March 1, 1928, and there is now due, owing and unpaid to this plaintiff on account thereof the sum of $3,000.00, with interest thereon at the rate of seven per cent per annum from and after March 18, 1928, and the whole thereof.

16

That said bonds are identical in form and substance with the form of bond set out above in paragraph 8, with the exception that the same were issued against the funds of said District No. 8, were dated and became due on different dates and bore different numbers, as shown above.

17

That under date of July 3rd, 1928, and while the above described bonds, so owned and held by the plaintiff herein, [fol. 27] and which are involved in this action, and the interest on said bonds, were due, owing and unpaid, on account of the mistake or inadvertence of the board making the original levy and assessment of benefits, having failed to levy an amount sufficient to pay the principal and inter-

est on said bonds as the same became due, and in order to comply with its statutory duty in the premises, the City of American Falls (formerly the Village of American Falls), regularly enacted its Ordinances Nos. 122, 123 and 124, which were ordinances providing for a re-assessment of benefits upon all taxable property in said Districts 1, 2 and 8, respectively, and directing the committee of streets, together with the city engineer, to make and file a reassessment roll of the taxable real property within the boundaries of each of said districts, and providing for the re-assessing the cost thereof against all taxable real property within said three respective districts and providing for the payment thereof; that in accordance with the provisions of said three ordinances, re-assessment rolls were made out, certified to and filed by the proper village officials, and notices of the filing of said rolls were given in the manner provided by statute.

18

That under the terms of said bonds, and under the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessments upon the property within [fol. 28] said sewerage and improvement districts, which assessments had to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued, and the said bonds, and the obligation represented thereby, under express provisions of said statutes, became a lien upon the lands within said sewerage and improvement districts, which liens have "precedence of all other liens"; that under the express provisions of the statutes authorizing the making of such assessments and issuance of the foregoing bonds, this plaintiff has no claim on account of said bonds against said Village-City of American Falls, except that said village was obligated to levy and collect the assessments; that the said Village-City of American Falls, from the issuance of said bonds until prevented from so doing by the acts of the defendant, as hereinafter alleged, levied special assessments, in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the same

manner as provided by law for the levy and collection of special assessments, under said statutory provisions.

19

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and act- [fol. 29] ing by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain against this plaintiff or its predecessor in interest, and without making any compensation whatever to this plaintiff, the defendant being well aware and advised that the bonds held by this plaintiff, and the interest thereon, were outstanding, due and unpaid, and that the assessments levied against the property were insufficient to pay such outstanding bonds, so held by the plaintiff, took absolute, permanent and exclusive possession, title and control of all the real property within said Local Sewerage Improvement Districts Nos. 1 and 2, and within said Local Improvement District No. 8, for a public use and purpose, to-wit, for a Reclamation Act storage reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts and inundated and permanently flooded the land embraced within said sewerage and improvement districts, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid, and that [fol. 30] the property so taken as aforesaid by the defendant as aforesaid, was at the time of the taking and destruction as aforesaid of a value greatly exceeding the claim of the plaintiff herein.

20

That the bonds so held and owned by the plaintiff, as hereinbefore alleged, were and are worth their respective face values, together with accrued and unpaid interest, and by and through the defendant's destruction of plaintiff's property as aforesaid, the defendant has become and is indebted to this plaintiff in the following amounts, to-wit:

$4,000.00, together with interest thereon at the rate of seven per cent per annum from and after April 28, 1927; $1,351.11, together with interest thereon at the rate of six per cent per annum from and after October 25, 1929, and $3,000.00, together with interest thereon at the rate of seven per cent per annum from and after March 18, 1928, and the whole thereof.

Wherefore plaintiff prays that it have and recover judgment against defendant for the following sums, to-wit: $4,000.00, together with interest thereon at the rate of seven per cent per annum from and after April 28, 1927; $1,351.11, together with interest thereon at the rate of six per cent per annum from and after October 25, 1929, and $3,000.00, together with interest thereon, at the rate of seven per cent per annum from and after March 18, 1928; together with [fol. 31] costs of suit and all proper relief.

W. G. Bissell, Branch Bird.

(Duly verified.)

IN UNITED STATES DISTRICT COURT

DEMURRER TO SECOND AMENDED PETITION—Filed Oct. 31, 1930

Comes now the defendant and demurs to the second amended petition of the plaintiff on file herein, on the ground that:

1. That said second amended petition fails to state facts sufficient to constitute a cause of action.

2. That said second amended petition, and particularly paragraph 17 thereof, considered in connection with the allegations of paragraph 19 of said second amended petition, shows upon its face that plaintiff is claiming under an alleged re-assessment ordinance and an alleged re-assessment made and levied more than a year after the date when it is alleged that the United States had acquired complete title to all of the property in the said reservoir site, and that the said re-assessment ordinance and said attempted re-assessment, under which plaintiff claims, are wholly void [fol. 32] for lack of legal authority in the city to make or

levy any assessment or re-assessment on the property of the United States.

3. That said second amended petition shows upon its face that the alleged taking of property by the United States in January, 1927, could not interfere with any timely, regular or lawful assessment made for the purpose of paying bonds which matured July 15, 1925; August 1, 1926, and September 1, 1926, respectively, and that the assessments claimed to have been interfered with and not paid must refer to the purported re-assessment mentioned at paragraph 17, made or attempted after 1927 and after the maturity of all said bonds, the payment of all original and regular assessments, and the transfer of title to the United States.

4. That the second amended petition is insufficient in that it fails to show the existence of any of the facts which are necessary under the state law (Section 4141, I. C. S.) to authorize such re-assessment.

5. That said second amended petition shows upon its face that the action is for recovery of an amount of money claimed to be secured by a lien, and that the owner of the property affected by the said lien has never been obligated for the amount claimed by the plaintiff, but that the property, only, is subject to payment of the said lien; that the purchaser of property subject to a lien, who has not assumed or agreed to pay the note or bond or other instrument secured by such lien, is not personally liable for the [fol. 33] note or bond and may be sued only in a foreclosure action against the property.

6. That the jurisdiction of the court to entertain action against the United States for the taking of property for public use is limited to cases where the officers of the United States who took the property used by, or for, the United States, acknowledged the plaintiff's ownership thereof at the time of such taking, and did not take the same under claim of ownership in the United States, and that the second amended petition wholly fails to show any acknowledgment by the officers of the United States that the plaintiff herein had any title or interest in the lands and other property alleged to have been taken and inundated for reservoir purposes, and by necessary implication

shows that the same were taken under claim of ownership in the United States and that such taking, therefore, cannot give rise to an action against the United States.

7. That the jurisdiction of the court to entertain action against the United States for damage resulting from the taking of property for public use is limited to cases where the damage was of a kind which was known, intended, expected and foreseen by the government officers at the time of the construction of the government works, but the seconded amended petition herein wholly fails to show that any damage to plaintiff was foreseen or intended by the government officers.

[fol. 34] 8. That the second amended petition, and particularly that part of paragraph 7 reading:

"and that *thereafter* * * * said John K. Mullen sold, transferred and set over to the plaintiff, * * * the bonds aforesaid",

wholly fails to show that the plaintiff owned any bonds or other property of any kind or had any interest in or lien on any property of any kind whatever at the time (namely, on or about January 1, 1927) when the damage complained of is alleged to have occurred through the flooding of the reservoir lands, and that the law applicable to such cases vests the right to the claim for damages in the party who was the owner of the damaged property, or some interest therein, at the time the alleged damage occurred. That a subsequent transfer of the damaged property does not carry with it any transfer of the claim for damages, the right to such damage claim remaining in the original owner, the presumption being that the purchaser of damaged property pays only the reduced or depreciated value thereof and suffers no loss, and that such rule is especially strong in cases against the United States because the federal statutes expressly prohibit the assignment or transfer of claims against the United States.

9. That said second amended petition shows upon its face that the costs of improvement in said districts 1, 2 and 8 were assessable against the "taxable real property within said three respective districts" only (paragraph 17) [fol. 35] and that when the purported re-assessment was

made (July 3, 1928) the title to the lots in said districts had been in the United States for a year and a half and, being tax exempt, said lots were not "taxable real property" within said districts.

10. And the defendant further demurs to the second amended petition of the plaintiff on file herein for the reason that said second amended petition fails to state facts sufficient to constitute a cause of action in that the said second amended petition is indefinite and uncertain and insufficient to state a cause of action, in the following particulars:

A. Pursuant to Sec. 3097, I. C. S., and decisions of the Idaho State Supreme Court construing the same, the liens of state and county taxes take precedence over liens for special improvement district assessments, but the second amended petition fails to allege that the defendant acquired title to the lots in said districts 1, 2 and 8 in some manner other than by purchase at tax sale for delinquent state and county taxes.

B. The second amended petition is indefinite in that it fails to allege the time when the plaintiff became the owner of the bonds upon which it bases its action.

C. The seconded amended petition fails to allege in what manner the United States by its action in January, 1927, prevented the City of American Falls from levying assess- [fol. 36] ments for the payment of the plaintiff's bonds which matured on July 15, 1925; August 1, 1926, and September 1, 1926, respectively.

D. The second amended petition fails to allege that there are no other bonds of said special improvement districts numbered 1, 2 and 8 in the hands of others, besides the plaintiff, which have not been paid.

E. The second amended petition fails to show which, if any, of the lots in the said special improvement districts had a value in excess of the original assessments against any such lot, and fails to show which, if any, of such lots has a value less than the original assessment thereon plus the attempted reassessment on such lot.

F. The second amended petition alleges an original assessment (paragraphs 5, 9 and 13) made by the City of

American Falls upon the lands of said improvement districts, and what purports to be a re-assessment (paragraph 17) for the same purpose, but the second amended petition is indefinite and uncertain in failing to allege whether or not its claim of lien is based upon the original assessments or upon the asserted re-assessments made on July 3, 1928.

G. The second amended complaint is indefinite and uncertain in that it fails to show that the City of American Falls pursued its Ordinances 122, 123, and 124, as mentioned in paragraph 17, by the levy of an assessment against the lots in said districts, as a basis for plaintiff's [fol. 37] alleged lien, or that notice of the filing of purported re-assessment rolls was given as required by law, the allegation that "notice of the filing of said rolls were given in the manner provided by statute" being merely the statement of a legal conclusion rather than an allegation of facts.

11. That there is a defect in parties plaintiff in that the plaintiff has not joined with it the owner or owners of those bonds of said Improvement Districts 1, 2 and 8 not owned by the plaintiff.

12. That said second amended petition is insufficient in that in paragraph 8 there is set up a copy of one of the several bonds of said District No. 1, (similar to the bonds of said Districts 2 and 8), on the face of which it is provided,

"In conformity with Subdivision 15, Chapter 80 of said Session Laws of 1911, it is hereby recited that 'the holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued, in any event, except for the collection of the special assessment made for the work of improvement for which said bond was issued, but this remedy, in case of non-payment, shall be confined to the enforcement of said assessment. A copy of this subdivision shall be plainly written, printed, or engraved upon the face of each bond so issued'."

but said second amended petition fails to show that the City of American Falls has not made the "collection of [fol. 38] the special assessment made for the work of improvement for which said bond was issued" and for which

the said city is liable, as the maker of said bonds, this being a necessary allegation because, if the city has made the necessary collection, no cause of action can lie against the owners of lots within said improvement districts.

H. E. Ray, B. E. Stoutemyer, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE SECOND AMENDED PETITION—Filed Oct. 31, 1930

The defendant moves the court to strike out portions of the plaintiff's second amended petition as follows:

From paragraph 7 of said second amended petition, beginning in the third from the last line thereof, strike the words and figures, "with interest thereon at the rate of seven per cent per annum from and after April 28, 1927";

From paragraph 11 of said second amended petition, beginning in the third from the last line thereof, strike the words and figures, "with interest thereon at the rate of seven per cent per annum from and after October 25th, 1929";

[fol. 39] From paragraph 15 of said second amended petition, beginning in the third from the last line thereof, strike the words and figures, "with interest thereon at the rate of seven per cent per annum from and after March 18, 1928";

From paragraph 20 of said second amended petition, beginning in the sixth line thereof, strike the words and figures, "together with interest thereon at the rate of 7% per annum from and after April 28, 1927"; and beginning in the seventh line thereof, strike the words and figures, "together with interest thereon at the rate of 6% per annum from and after October 25, 1929"; and beginning in the ninth line thereof, strike the words and figures, "together with interest thereon at the rate of 7% per annum from and after March 18, 1928";

From the prayer of said second amended petition, strike the words and figures beginning on lines 2, 4 and 5, respectively, as follows: "together with interest thereon at the rate of 7% per annum from and after April 28, 1927";

"together with interest thereon at the rate of 6% per annum from and after October 25, 1929"; and "together with interest thereon at the rate of 7% per annum from and after March 18, 1928,"

on the ground that those parts of said second amended petition, above quoted, are irrelevant and improper and contrary to the statutes applicable to this class of action, and in conflict with Section 284 (Judicial Code, Section 177 amended), Title 28, Code of Laws of U. S. A.

[fol. 40] And the defendant further moves the court to strike from plaintiff's second amended petition that part of paragraph 5 of said petition reading as follows:

"but that the levies and assessments so made, through mistake or inadvertence, were not in fact sufficient to pay the principal and interest on said bonds as the same become due and payable according to their terms and provisions, or at all,"

and the same words from paragraphs 9 and 13 of said second amended petition, on the ground that the same are irrelevant and immaterial and do not state a cause of action, or any part of a cause of action in that the statute authorizing re-assessment provides (Sec. 4141, I. C. S.):

"Whenever for any cause, mistake or inadvertence the amount assessed *shall not be sufficient to pay the costs of the sewerage improvement made and enjoined on the property*", etc.,

and that under the statute the insufficiency of a levy or assessment "to pay the principal and interest on said bonds" is not a ground for re-assessment.

And the defendant further moves the court to strike plaintiff's second amended petition from the files for violation of the rules of this court in the filing of said second amended petition without permission of the court.

[fol. 41] This motion is based upon the said second amended petition and upon the provisions of Sec. 284 (Sec. 177, Judicial Code as amended), Title 28 of the Code of Laws of the U. S. A., and Sec. 283 (Sec. 176, Judicial Code), Title 28 of the Code of Laws of the U. S. A., and Sec. 4141, I. C. S.

H. E. Ray, B. E. Stoutemyer, Attorneys for Defendant.

In United States District Court

Motion to Require Plaintiff to Make Its Second Amended Petition More Definite and Certain Filed Oct. 31, 1930

Comes now the defendant and moves the court to require the plaintiff to make its second amended petition more definite and certain in the following particulars, to wit:

1. That the plaintiff be required to allege in its second amended petition the manner in which the United States acquired the lots in improvement districts numbered 1, 2 and 8; and whether or not any of said lots were acquired through tax sale for the payment of delinquent state or county taxes.

2. That the plaintiff be required to allege in its second [fol. 42] amended petition the time when the bonds described therein were acquired by the plaintiff.

3. That the plaintiff be required to allege in its second amended petition the ownership of the remaining bonds of said improvement districts numbered 1, 2 and 8, other than those alleged to be in the ownership of the plaintiff, or whether the plaintiff is the owner of all outstanding and unpaid bonds of said respective districts.

4. That the plaintiff be required to allege in its second amended petition whether or not the assessments levied upon the lots of said districts pursuant to Ordinances 55, 64, 66, 68, 69, 74, 75, 79, 80, 83, and 84 of the then Village of American Falls, as described in paragraphs 5, 9 and 13 of said second amended petition, have been paid by the defendant or its predecessors in interest, the owners of said lots.

5. That the plaintiff be required to allege in its second amended petition whether or not its lien, claimed as against the lots of said districts, is by reason of original assessments and pursuant to Ordinances numbered 55, 64, 66, 68, 69, 74, 75, 79, 80, 83 and 84 of the then Village of American Falls, or by reason of the ordinances of the City of American Falls, numbered 122, 123 and 124, providing for a re-assessment, and, if by reason of said ordinances providing for the original assessment as well as those provid-

ing for re-assessment, the amounts claimed by plaintiff under each thereof.

[fol. 43] 6. That the plaintiff be required to allege in its second amended petition in what way and to what extent the alleged original levies and assessments "were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable according to their terms and provisions, or at all" and what other causes besides the said alleged error and mistake contributed to the default in the payment of the said bonds.

H. E. Ray, B. E. Stoutemyer, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER AND MOTIONS—Filed April 4, 1931

The demurrer to, and motion to strike, the second amended petition, and motion for a more definite statement, of the defendant, having been submitted, and after consideration of the same,

It is ordered that said demurrer and motions be and the same are hereby overruled.

Dated Boise, Idaho, April 4th, 1931.

Charles C. Cavanah, District Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

ANSWER TO SECOND AMENDED PETITION—Filed May 6, 1931

Comes now the defendant, United States of America, and as its answer to plaintiff's second amended petition herein alleges as follows:

1. Defendant denies each and every allegation set out in plaintiff's second amended petition herein, except the allegations expressly admitted by this answer.

2. The defendant admits the allegations of paragraphs 1, 2 and 3 of plaintiff's second amended petition herein.

3. Replying to paragraph 4 of plaintiff's second amended petition herein, the defendant admits that this action involves a claim against the government of the United States for an amount less than $10,000.00, but denies that the same is upon an implied contract for compensation, and alleges the facts to be that there has never been any contract, express or implied, of any kind or sort whatsoever, between the United States and the plaintiff herein.

4. Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set out in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of plaintiff's second amended petition herein and therefore denies each and every allegation contained in said para-
[fol. 45] graphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16.

5. Defendant admits that under date of July 3rd, 1928, the City of American Falls (formerly Village of American Falls) enacted ordinances which provided or attempted to provide for a re-assessment of benefits upon all taxable property in said Districts 1, 2, and 8, respectively, but defendant alleges that said attempted re-assessment of benefits was made or attempted more than a year after the United States had acquired by purchase and condemnation complete title to all the property in the said improvement districts and had paid or caused to be paid all the original assessments and liens on said property and that the said attempted re-assessment was wholly void as against the United States and its property, and defendant denies that said attempted re-assessment was made on account of the mistake or inadvertence of the board making the original levy but alleges that the said re-assessment was made or attempted for the purpose of trying to recoup the losses and excess interest charges incurred by the city through the negligence, delay, and misconduct of the said city and its officers in the particulars hereinafter more fully set out.

6. Replying to paragraph 18 of the plaintiff's second amended petition herein, the defendant denies that under the applicable statute of the State of Idaho, the only method
[fol. 46] of enforcing and collecting the said bonds was by the levy and collection of special assessments upon the property within said sewerage and improvement districts,

and alleges the facts to be that under the terms of the said bonds, and under the applicable statutes of the State of Idaho, the special assessments for the payment of the cost of the said work and for the payment of the said bonds had already been levied, assessed and apportioned to the various lots, parcels and tracts of land in said improvement districts prior to the time that the said bonds were issued and sold, and that the said bonds show upon their face that said apportionment and assessment of the costs of said improvement had already been made at the time the bonds were issued, and that in the event of failure to pay such assessment, the statutes give a remedy by foreclosure of the assessments so referred to. Defendant denies that assessments have to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued. Defendant denies that the said bonds or the obligation represented thereby, under express provisions of said statutes or otherwise, became a lien upon the lands within said sewerage and improvement district, but alleges the facts to be that the assessments so levied and apportioned against the various tracts of land in said district are declared to be a lien but that the bonds themselves are not [fol. 47] a lien, and defendant alleges that the costs of the said improvement work were duly assessed and apportioned to the various lots and tracts of land in each of the said special improvement districts and were made payable in ten annual installments, as provided for in Chapter 80 of the Session Laws of Idaho of 1911, and that under the provisions of Subsection 11 of Section 2353 of the Political Codes of Idaho as amended by said Chapter 80 of the Session Laws of 1911, and particularly as set out on page 263, it is provided that

The owner of any lot or parcel of land charged with any such assessment may redeem the same from all liability for said assessments at any time after said 30 days by paying all the installments of said assessment remaining unpaid and charged against such property at the time of such payment, with interest thereon at the rate of not to exceed 8% per annum from the date of issuance to the time of maturity of the last installment;

and defendant alleges that each and every one of the lots and parcels of land included in the said improvement dis-

tricts and within the said American Falls reservoir site was redeemed from the said assessment, so made and levied against the said lands for the payment of the cost of said improvements, by the United States and its predecessors in interest in the ownership of the said property, and that the said assessment and apportionment of costs has been [fol. 48] fully paid, but that a portion of the money so paid in to be applied in the retirement of the said bonds and the interest thereon was, after the payment thereof, lost through failure of banks in which said funds were deposited without adequate security or diverted and lost in other ways more fully set out in the defendant's second defense herein. Defendant further denies that the said Village-City of American Falls was obligated to levy and collect any assessments other than those which were levied and collected as aforesaid, and denies that the said Village-City of American Falls was prevented from levying assessments by any act of the defendant.

1. Replying to paragraph 19 of the plaintiff's second amended petition, defendant denies that on or about the 1st day of January, 1927, the United States, acting by and through its authorized agents of the Department of the Interior, or at any time or in any manner except the time and in the manner alleged in defendant's second defense herein, took absolute, permanent and exclusive possession of all of the real property within said special improvement districts without any proceeding in eminent domain; but alleges that prior to taking possession of said property and using the same for reservoir purposes, the United States acquired title thereto by purchase from the lawful owners of record of said property, and by proceedings in eminent domain, and in connection with said purchases and [fol. 49] said proceedings in eminent domain paid or required to be paid all mortgages and liens appearing of record against the said premises, including all the said assessments, so apportioned and levied against the said premises for the payment of the cost of the improvements in said special improvement districts, and caused each and every tract of land in said district to be redeemed from said assessments and said liens in the manner provided in the said statute, but that after a portion of said funds so paid by the United States and its predecessors in the ownership of the said lands had been lost through the said bank

failures and through the neglect, negligence and misconduct of the city and its officers in depositing said funds in unsafe banks without adequate security and the use of a large part of the funds collected by the city in payment of excess interest incurred on said bonds through the delay and neglect of the city and its officers in failing to apply promptly and properly the funds collected from the lot owners to the retirement of the bonds and the action of the city and its officers in allowing such funds for long periods of time either to remain on deposit in local banks or to be used for other purposes while the bonds continued to draw interest which would have been avoided had said collections been promptly and properly applied to the retirement of the bonds, and after the United States had purchased and paid for the said property and had redeemed or caused the same [fol. 50] to be redeemed from the liens of said assessments, the city council of the said Village-City of American Falls attempted to impose upon the United States an obligation to make up the losses resulting from the said carelessness, neglect and misconduct of the officers of the said municipality and other public officers of the city and county handling the said funds as tax collections, and for such purpose attempted to make a re-assesment upon the lands and property then owned by the United States and acquired in the manner aforesaid, which void re-assessment so attempted by the said city council was the only assessment against the said premises which has not been fully paid; and defendant denies that the defendant ever deprived the plaintiff of its property or destroyed or damaged any property of the plaintiff in any manner whatsoever; and defendant alleges that, to the contrary, the actions of the United States as aforesaid were beneficial to the holders of the bonds of the said municipality and of the said special improvement districts in that prior to the time that the United States began the negotiations for and the purchase of the said property, many lot owners in said improvement districts had failed and neglected to pay their taxes and assessments and some of said lot owners had abandoned their said lots to tax sale and that by the said action of the United States, as aforesaid, in paying or requiring payment of all said assessments and tax liens on said premises, [fol. 51] the amounts which were paid in on said assessments, and which became available for the payment of the

bonds and the interest thereon, were larger than would have been collected if the United States had not purchased and taken over said property; that only a portion of the said townsite of American Falls was so purchased, taken over, and used for reservoir purposes and that in the said portions of said townsite of American Falls which were not so purchased or condemned by the United States for reservoir purposes, many defaults occurred in the payment of taxes and a larger percentage of deficiency in the payment of bonds than in the section purchased by the United States for reservoir purposes as aforesaid.

8. Replying to paragraph 20 of the plaintiff's second amended petition herein, defendant has no knowledge as to whether the bonds, if any, held or owned by the plaintiff were and are worth their respective face value with accrued and unpaid interest, and therefore denies the same; and defendant denies that there was any destruction of plaintiff's property by and through the defendant, and denies that the defendant has become or is indebted to the plaintiff in the amount set out in said paragraph 20 of the second amended petition, or in any amount or amounts, or at all.

Defendant's Second Defense

As defendant's second and further defense to plaintiff's [fol. 52] alleged cause of action herein, defendant alleges:

9. That prior to the taking of any property for use in collection with the said American Falls reservoir, and prior to the flooding and use thereof, the United States acquired title to the same, free from liens and encumbrances, in part by condemnation but mainly by purchase of said property from the record owners thereof, and paid or caused to be paid all liens of record against the said premises, including the liens for the cost of said improvements in said improvement districts so assessed and apportioned against said premises as aforesaid, and caused each and every of the said lots to be redeemed from the said assessment and from the lien thereof and from each and every of the installments in which said assessment was provided to be paid, by payment in full of the said assessments and all installments thereof in the manner authorized and provided under Chapter 80 of the Session Laws of Idaho of 1911, page 263.

10. That a part of the funds so paid and intended for payment of special improvement district bonds, referred to in the petition herein, were lost in the following manner:

(a) That a part of the said money so collected was deposited by the municipal officers having charge thereof, without adequate security, in a local bank and was lost through the failure of said bank.

[fol. 53] (b) That several thousand dollars of the funds which should have been applied to the payment of the principal of the said bonds was consumed in the payment of excess interest over and above the amount that should have been required for interest payment, which excess interest was allowed to accumulate on the outstanding bonds while, through the delay and neglect of the city offices to apply promptly the moneys so collected from the lot owners to the retirement of the special improvement district bonds and the practice of allowing such funds either to remain idle on deposit in local banks or to be used for other purposes or both, the bonds remained outstanding and continued to draw interest.

(c) That by reason of such failure to apply promptly collections to retirement of bonds, the amount of money caught in the bank failure above referred to was largely in excess of the amount that would have been on deposit therein had such collections been promptly applied to retirement of the bonds, and that by reason of such bank failure, the part of the said deposit therein which was finally collected was tied up for a number of years and was unavailable for payment of bonds, so that the bonds which should have been paid remained outstanding and continued to draw interest, while said funds were tied up in the said closed bank, and funds thereafter collected by the city for the payment of said improvement bonds were largely con-
[fol. 54] sumed in the payment of excess interest, the interest charges being paid first, and as a result certain bonds having the largest serial numbers remained unpaid.

(d) That in various and sundry other ways, not fully known to the defendant, funds which should have been used on said special improvements or in the payment of the bonds therefor were lost, dissipated, or misapplied.

11. That after the United States had acquired title to the said property in the said reservoir site and had paid for the same, and paid or caused to be paid all liens of record, and had caused said property to be redeemed from the said local improvement district assessments as aforesaid, the city council of the city of American Falls attempted to make up the losses above enumerated by making a re-assessment and attempting to impose upon the United States an additional lien or burden by means of such re assessment levied and attempted by the said city council after title to the said premises free from liens and encumbrances had vested in the United States, which re assessment the defendant alleges was void; and that such void assessment, so attempted by the city council after title had passed to the United States, was the only assessment on the said property which has not been paid.

Defendant's Third Defense

As a separate and additional defense to plaintiff's second [fol. 55] amended petition herein, defendant repeats and reiterates each and every allegation set out in defendant's second defense herein and makes the same a part of defendant's third defense herein, and alleges:

12. That at the time the United States took possession of the said property in the said American Falls reservoir site and applied the same to public use by the inundation of the same by the waters of the American Falls reservoir, the United States and the officers of the United States in charge of the said project claimed title to all of said property as the property of the United States and took the same under claim of title in the United States and never recognized the plaintiff herein as the owner of the said property or any part or interest therein.

Defendant's Fourth Defense

As a fourth separate and additional defense to plaintiff's second amended petition herein, defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and makes each and every of said allegations a part of defendant's fourth defense herein, and further alleges:

13. That at the time the said property in the said American Falls reservoir site was taken by the officers of the United States and applied to the said public use in connection with the said American Falls reservoir, it was not fore-[fol. 56] seen nor intended that the said action of the United States in purchasing, condemning and using said property for said public purpose would or could damage the plaintiff herein, or any of the bondholders of the said improvement districts; but, to the contrary, it was expected that the said action of the United States in purchasing said premises and causing the assessment of liens to be paid in full and the said property to be redeemed therefrom would be beneficial to the holders of the said bonds of said special improvement districts, in providing a larger fund for the payment thereof than would otherwise have been available and in avoiding the losses which otherwise might have resulted from the failure of certain lot owners to pay taxes and the abandonment of certain lots to tax sale; and that the said officers of the United States, and all of the officers of the United States in charge of the said project, believed at the time of the purchase and taking of the said property by the United States, and still believe, that the said action of the United States and the said action of the said officers in so taking and using said property would and did prove beneficial to the bondholders.

Defendant's Fifth Defense

As a fifth separate and additional defense to plaintiff's second amended petition herein, the defendant reiterates and repeats each and every allegatiaon set out in defendant's second defense herein, and further alleges:

[fol. 57] 14. That defendant is informed and believes, and therefore and on that ground alleges the fact to be that the plaintiff acquired whatever interest, if any, the plaintiff may have in the said bonds claimed by plaintiff after the lands in the said reservoir site had been acquired by the United States through purchase and condemnation aforesaid and after the same had been applied to the said reservoir purposes.

Defendant's Sixth Defense

As a sixth and further defense to plaintiff's second amended petition herein, the defendant reiterates and

repeats each and every allegation set out in defendant's second defense herein and further alleges:

15. That the United States acquired in the manner aforesaid most of the lands in said special improvement districts and most of the lands in the said reservoir site more than five years prior to the date that this action was filed and that for more than five years prior to the date that this action was filed, the United States has held possession of the said lands openly, notoriously and adversely to the plaintiff and to all the world and that this action is barred by Sections 6596, 6609, 6597, 6617, and 6611 of the Idaho Compiled Statutes and that part of said lands were so acquired by the United States more than six years prior to the filing of this action and that this action is barred under [fol. 58] Title 28, Section 41, Subsection 20 of the Code of Laws of the United States (Sec. 24 of the Judicial Code as amended).

Defendant's Seventh Defense

As a seventh and further defense to plaintiff's second amended petition herein, the defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and further alleges:

16. That there is no contract of any kind, express or implied, between the plaintiff and the United States, that the transactions set out and described in said second amended petition, and more fully described herein, do not give rise to any actual contract or any contract implied in fact, but that the alleged damage complained of is indirect and based on an alleged duty on the part of the United States to pay taxes or special assessments or re-assessments and that this action is not within the jurisdiction of the court.

Wherefore defendant prays that the plaintiff take nothing by its complaint herein, and that the defendant have judgment against the plaintiff for its costs in this cause of action.

H. E. Ray, B. E. Stoutemyer, Attorneys for Defendant.

(Duly verified.)

[fol. 59] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed Jan. 23, 1932

Now on this 2nd day of November, 1931, the above matter came duly on for hearing, plaintiff being present by W. G. Bissell and Branch Bird, its attorneys; defendant being present by H. E. Ray and B. E. Stoutemyer, its attorneys, whereupon plaintiff introduced its evidence and rested, defendant introduced its evidence and rested; plaintiff introduced its rebuttal evidence and rested, whereupon said cause was by the court taken under advisement, and the court being duly advised in the premises, does now make its Findings of Fact as follows:

FINDINGS OF FACT

1

That in 1925, J. K. Mullen, deceased, founded the John K. and Catherine S. Mullen Benevolent Corporation, a corporation, and that ever since said time, the plaintiff has been and now is a corporation, citizen, and resident of the State and District of Colorado.

2

That during all times the defendant is and has been the United States of America, and as such did and performed [fol. 60] all of the acts hereinafter set out, acting by and through the agency of the United States Reclamation Service.

3

That during all the times mentioned in the second amended complaint herein the Village (City) of American Falls was a municipal corporation of the state of Idaho.

4

That this action involves a claim against the government of the United States for less than $10,000 upon an implied contract.

5

That on February 23, 1915, the City of American Falls (then Village) regularly enacted its certain ordinance of intention to organize a sewerage district to be known as Local Sewerage Improvement District No. 1 of said village, and to construct a sewerage and disposal works in said district, and to issue bonds for the payment of the costs thereof; that in accordance with said ordinance and on March 18, 1915, said village regularly enacted its Ordinance No. 55, which was an ordinance creating and establishing said district, which ordinance provides for the appointment of a sewerage committee, the construction of said sewerage system, and the assessment of the costs thereof against the property in District No. 1; that in regular [fol. 61] course the assessments provided for in said Ordinance No. 55 were duly levied and an assessment roll containing the names of the owners, description of the property, and the amount of assessment thereon against the various parcels of property in said district was certified to and filed; that notice thereof was published as provided by law; that on July 6, 1915, said village enacted its ordinance No. 66, approving and confirming the proceedings in making the assessment for the cost of construction of said system, confirming the assessment roll, and providing for the payment of such assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum, payable semi-annually; that on July 6, 1915, said village enacted its Ordinance No. 64, which *which* was an ordinance amending said ordinance of intention to create said district; that on the 6th day of July, 1915, said village enacted its ordinance No. 65, amending said Ordinance No. 55 in certain minor particulars; that on July 15 and 22, 1915, said village regularly published notices of the filing of the above mentioned assessment roll and notice of the confirmation of the levies made thereunder, and appointing the time and place where objections might be made; that on October 7, 1915, said village regularly enacted its Ordinance No. 68, which was an ordinance amending certain portions of said Ordinance 66; that on October 7, 1915, the said Village of American Falls regularly enacted [fol. 62] its Ordinance No. 69, which was an ordinance authorizing and providing for the issuance and sale of special assessment sewerage improvement bonds in the aggregate principal sum of $24,000.00, to provide funds to pay for the

cost of the construction of said system, said ordinance prescribing the form and date of the bonds, the time and payment thereof, and providing for the levying and collection of special assessments which were then calculated as sufficient to pay the principal and interest of said bonds in accordance with their tenor and effect; that the levies and assessments so made through mistake or inadvertence were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable according to their terms and provisions.

6

That in accordance with the authority contained in said Ordinance 69, the said village issued under date of July 15, 1915, its twenty-four special assessment sewerage improvement bonds of District No. 1, numbered from 1 to 24, both inclusive, of the denomination of $1,000.00 each, with interest at the rate of seven per cent per annum, payable semi-annually, payable on or before July 15, 1925.

7

That upon the issuance of said bonds and before maturity thereof, the said J. K. Mullen purchased and acquired all of said bonds, paying therefor, the full face value [fol. 63] thereof; that thereafter and in 1925, the said J. K. Mullen gave and transferred bonds Nos. 21, 22, 23, and 24 to the plaintiff, the John K. and Catherine S. Mullen Benevolent Corporation; and that said plaintiff is now the owner and holder of said bonds; that no part of said bonds, or either of them, has been paid; that there is due, owing, and unpaid upon said bonds the principal sum of $4,000.00, with interest thereon at the rate of seven per cent per annum from and after April 28, 1927, to the date of the filing of this suit, to-wit: November 23, 1929.

8

That the bonds are identical in form and substance, excepting in numbers, and that the form of said bonds is set out in full in paragraph 8 of the second amended complaint.

That on the 9th day of May, 1916, said city of American Falls (then Village), a municipal corporation of the State of Idaho, regularly enacted its Ordinance No. 68, which was

an ordinance of intention to organize Local Sewerage Improvement District No. 2 of said village, and to construct a sewerage system therein, and to issue bonds for the payment of the cost and expense thereof; that on June 6th, 1916, said village regularly enacted its Ordinance No. 74, which was an ordinance creating and establishing Local Sewerage Improvement District No. 2 of said village, providing for the construction of a sewerage system therein, [fol. 64] and providing for assessing the cost thereof against the property in said district; that in accordance with the provisions of said Ordinance No. 74, an assessment roll of the property within said improvement district was certified to and filed, which contained the names of the property owners, a description of the property in separate parcels and the amount of the assessment against each particular parcel of land; that notice of the filing of such assessment roll was given in the statutory manner; that under date of August 1st, 1916, said village regularly enacted its Ordinance No. 79, which was an ordinance approving and confirming the proceedings had in the making of such assessments, and providing for the payment of such assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum; that under date of December 9th, 1916, said village regularly enacted its Ordinance No. 83, which was an ordinance authorizing and providing for the issuance and sale of special assessment sewerage improvement bonds of said district in the aggregate principal sum of $7,150.00, to provide for the construction of said sewerage system within said District No. 2; that the latter ordinance prescribed the form and date of the bonds, the time and payment thereof, and provided for the collection of special assessments, then calculated as sufficient to meet the principal and interest of said bonds, but that the levies [fol. 65] and assessments so made, through mistake or inadvertence, were not in fact sufficient to pay principal and interest on said bonds as the same became due and payable, according to their terms and provisions, or at all.

10

That in accordance with the authority contained in said Ordinance No. 83, the said Village of American Falls issued, on August 1st, 1916, its fifteen certain special assessment sewerage improvement bonds for District No. 2,

numbered consecutively from 1 to 15, both inclusive, the first fourteen being each in the amount of $500.00 and the fifteenth bond being of the denomination of $150.00, and that said bonds were due and payable on or before August 1st, 1926, and bore interest at the rate of seven per cent per annum, payable semi-annually.

11

That upon the issuance of said bonds, before maturity thereof, one J. K. Mullen purchased and acquired all of said bonds, paying therefor the full face value of said bonds, and that thereafter and in 1925, the said J. K. Mullen gave, transferred, and set over to the plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, the bonds aforesaid; and that the plaintiff is now the owner and holder of said bonds Nos. 12, 13, 14, 15, and that no part of said bonds has been paid, except the interest [fol. 66] thereon to October 25, 1929, and $198.69 of the principal thereof; and that there is now due and unpaid to the plaintiff on account thereof the sum of $1,351.11, with interest thereon at the rate of seven per cent per annum from and after October 25, 1929, to the date of the filing of this suit, to wit: November 23, 1929.

12

That the said bonds of District No. 8 were identical in form and substance with the form of the bond set out in paragraph 8 of said second amended complaint.

13

That on May 2nd, 1916, said City of American Falls (then Village) regularly enacted its ordinance of intention to create and establish Local Improvement District No. 8 within said Village, for the construction of cement walks upon certain specified portions of said district; that on June 7th, 1916, said village regularly enacted its Ordinance No. 75, which was an ordinance creating and establishing Local Improvement District No. 8 within said village, which ordinance described the property to be included within the districts and provided for the construction of cement sidewalks and cross-walks upon portions thereof; that in accordance with the provisions of the latter or-

dinance, the village officials made out, certified to, and filed an assessment roll, stating the name of the owners of each [fol. 67] parcel of land within the district, describing such parcels of land separately, fixing the rate of the assessment and the total amount thereof as against each parcel of said land; that notice of the filing of said assessment roll was given in the manner provided by statute; that on September 6th, 1916, said village regularly enacted its Ordinance No. 80, which was an ordinance approving and confirming the proceedings had in establishing said Improvement District No. 8, in making said assessments and approving and confirming the assessment roll so prepared and filed, and the assessments levied thereunder as against the property within said district, and providing for the payment of said assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum; that on December 9th, 1916, said village regularly enacted its ordinance No. 84, which was an ordinance authorizing and providing for the issuance and sale of special improvement bonds of said district in the aggregate principal sum of $21,526.05 to provide for the payment of the cost of said improvements, which ordinance further provided for the form and sale of said bonds and the time of payment thereof, and further for the collection of the special assessments then calculated as sufficient to pay the principal and interest of said bonds as and when the same matured, but that the levies and assessments so made, through mis- [fol. 68] take and inadvertence, were not in fact sufficient to pay the principal and interest of said bonds as the same became due and payable, according to their terms and provisions.

14

That in accordance with the authority contained in said Ordinance No. 84, the said Village of American Falls issued on September 14, 1916, its forty three certain special assessment improvement bonds for District No. 8, numbered consecutively from 1 to 43, inclusive, each bond being of the denomination of $500.00, due and payable on or before September 1, 1926, together with interest at the rate of seven per cent per annum, payable semi-annually.

15

That upon the issuance of said bonds and before the maturity of said bonds, one J. K. Mullen purchased the entire issue of said bonds, paying therefor the full face value of said bonds, and that thereafter and in 1925, the said J. K. Mullen gave and transferred said bonds to said John K. and Catherine S. Mullen Benevolent Corporation, the plaintiff, and that the plaintiff is now the owner and holder of said bonds numbered 38, 39, 40, 41, 42, and 43; that no part of said last mentioned bonds, or either of them, has been paid except the interest thereon until March 18, 1928; and that there is now owing and unpaid to the plaintiff on account thereof the sum or $3,000.00, [fol. 69] with interest thereon at the rate of seven per cent per annum from and after March 18, 1928.

16

That said bonds were and are identical in form and substance with the form of the bond set out in paragraph 8 of the second amended complaint, with the exception that the same were issued against the funds of said District No. 8, and were dated and became due on different dates and bore different numbers, as shown in paragraph 8 of the second amended complaint.

17

That on the 3rd day of July, 1928, the above bonds of Districts Nos. 1, 2, and 8, heretofore mentioned, and the interest thereon as heretofore set out, being due, owing, and unpaid on account of the mistake and inadvertence of the board in making the original levy and assessment of benefits, having failed to levy an amount sufficient to pay and discharge the principal and interest on said bonds as the same became due, and in order to comply with its statutory duty in the premises, the City of American Falls (formerly the Village of American Falls) regularly enacted its Ordinances Nos. 122, 123, and 124, which were ordinances providing for the reassessment of benefits upon all property in said Districts 1, 2, and 8, respectively, and [fol. 70] directing the committee on streets, together with the city engineer, to make and file a re-assessment roll of the taxable real property within the boundaries of each of

said districts, and providing for the re-assessing of the cost thereof against all the real property within the said three respective districts; that in accordance with the provisions of said three ordinances, re-assessment rolls were made out, certified to, and filed by the proper village officials, and notices of the filing of said rolls were given in the manner provided by the statutes, but that the making and passing of said ordinances and re-assessments afforded and could afford the plaintiff, the holder of said bonds, no relief for the reasons in these findings hereinafter set forth, and that the said ordinances were passed and re-assessments made by said city in compliance with the statutory mandate and for its own protection.

18

That under the terms of said bonds and the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessments upon the property within said sewerage improvement districts, which assessments had to be levied and collected in the same manner as provided by law for the levy and collection of the original special assessments for such improvements, where no bonds were issued; that the said bonds and the obligations represented [fol. 71] thereby under the express provisions of the statutes of the State of Idaho became a lien upon all the land within the said improvement districts, which liens have precedence over all other liens except state, county, and municipal taxes; that under the express provisions of the statute authorizing and making of such assessments and issuance of bonds, the plaintiff had no claim on account of said bonds against the Village (City) of American Falls, except that the Village (City) was obligated to collect the assessments; that the said Village (City) of American Falls from the issuance of said bonds until prevented from so doing by the acts of the defendant, as hereinafter mentioned in these findings, levied and collected special assessments in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the manner provided by law for the levy and collection of special assessments.

19

That on the 1st day of January, 1927, the defendant, the United States of America, under the Acts of Congress, acting by and through its Department of the Interior and the United States Reclamation Service, without any proceedings in eminent domain against the plaintiff or its predecessor in interest J. K. Mullen, the defendant being aware and advised that the bonds held by this plaintiff [fol. 72] and the interest thereon were outstanding, due, and unpaid, and being aware that the assessments levied against said property were insufficient to pay said outstanding bonds so held by the plaintiff, took absolute, permanent, and exclusive possession, title, and control of all the real property within said Local Sewerage Improvement District No. 8, for a public purpose, to wit: for a site for a Reclamation Act storage reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed, or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts, and inundated and permanently flooded the land embraced within said sewerage and improvement districts, and thereby deprived the plaintiff of its property and totally destroyed plaintiff's property, and deprived it of its statutory remedy and proceeding for the collection of its bonds, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and the collection of the bonds aforesaid, and that the property so taken by flooding, as aforesaid, by the defendant was at the time of the taking of a value greatly in excess of the claim of the plaintiff; that the bonds aforesaid held and owned by the plaintiff before and at the time of the taking of the property were and are worth their respective face value, together with accrued unpaid interest.

[fol. 73] 20

That at the time the defendant acquired the title to the various lots, tracts, and parcels of land within said improvement districts, the defendant was aware that the assessments originally made against the property were insufficient to pay the bonds aforesaid and the interest thereon in accordance with their terms, tenor, and effect,

and for the purpose of protecting the United States against any claim of this plaintiff withheld a portion of the purchase price agreed upon between the defendant and the respective sellers, which sum so withheld by said defendant for the purpose of protecting the United States against the claim of the plaintiff was approximately $14,000.00, which said sum was held by the defendant until the institution of this suit.

21

That on the date of the filing of this suit, to wit: November 23, 1929, there was due and unpaid on account of said bonds in Districts 1, 2, and 8 the sum of $9,547.33; that prior thereto the City of American Falls had received payments made on account of said bonds from the various owners of the tracts, lots, and parcels of land situated within said three districts, certain sums of money which it had on deposit in the First National Bank of American Falls at the time of its failure, a part of which said sum has been collected from said insolvent bank, and that had said sums of money on deposit in said insolvent bank been [fol. 74] applied to the payment of the bonds in Districts 1, 2, and 8 in accordance with the terms of said bonds, that the amount due on November 23, 1929, would have been the sum of $1,442.54, and that the defendant should be credited with such amount; and that after the allowance of such credit, the net amount due the plaintiff on account of said bonds on the 23rd day of November, 1929, was and is the sum of $8,104.79.

22

That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, but only paid the amount shown upon the original assessment, and at the time of the paying of the amount shown on the original assessment the defendant was aware that said original assessment through mistake and inadvertence was not sufficient to pay the bonds issued by said Districts 1, 2, and 8 as the same became due and payable in accordance with their terms.

23

That by the terms of the statute authorizing the same and by the terms of the bonds all sums of money collected on account of said special assessments must be first used and applied to the payment of interest on said bonds; that no money collected for the payment of said bonds was lost [fol. 75] through the delay and neglect of the city officials to apply promptly the moneys collected from the lot owners for the retirement of the bonds, and that the moneys collected by the city, with the exception of the moneys lost by reason of the failure of the bank, were applied to the payment of the bonds in accordance with the Statutes of the State of Idaho and the terms of the bonds; that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking recognized the rights of the plaintiff and withheld from the private individuals owning said property an amount of money sufficient to discharge the claim of the plaintiff.

24

That at the time of the taking of said property by the defendant, it was known to the defendant and the officials of the Reclamation Service that assessments levied in Districts 1, 2, and 8 were insufficient to pay and discharge the amount due on the bonds of Districts 1, 2, and 8; and that the holders of said bonds would be deprived of the amount due thereon unless the same was paid by the defendant United States, and that at the time of the taking of the property the defendant United States, acting by and [fol. 76] through the Bureau of Reclamation, withheld from the record owners of said property an amount sufficient to fully pay and discharge the claim of this plaintiff.

25

That the defendant acquired all of the property within the limits of district 1, 2, and 8 for the reservoir purpose only, in some instances by condemnation proceedings, to which the plaintiff or its predecessor in interest was not

made a party, but mainly by deeds from the record owners in various and divers times between 1920 and January 1, 1927; but that the former record owners thereof retained the right of possession until January 1, 1927, and that the property was taken for a public purpose, that is to say, for the reservoir purpose, and flooded it on or shortly after January 1, 1927.

And the court, after making the findings of fact, does here and now make it conclusions of law

CONCLUSIONS OF LAW

1

That the defendant by the taking and flowage of private property, to wit: the lots, tracts, and parcels of land constituting said Districts 1, 2, and 8 for a public purpose, that is to say, for the construction of a storage reservoir, under authority of an Act, or Acts of the Congress of the United States, impliedly contracted to pay all damages [fol. 774] suffered by any and all persons owning or having unpaid liens upon the real estate within said districts up to an amount not exceeding the reasonable value of the property taken by it for, and applied to, a public use.

2

That the defendant is entitled to credit of, and for, the amount of money collected by the City of American Falls for the purpose of discharging the claim and lien of the plaintiff and by it deposited in, and lost through the failure of, the First National Bank of American Falls, Idaho; that the plaintiff is entitled to and should recover the amount due upon and on account of said bonds and interest on the 23rd day of November, 1929, after a credit of the amount collected by the city and lost in the failure of the First National Bank of American Falls is deducted from such amount.

3

That the statute of limitations began to run on the date of the flooding of the property, that is to say, on or about January 1, 1927, and that said statute is not available as a defense in this case.

4

That the funds collected by the City of American Falls for the payment of the interest and principal of plaintiff's bonds were not negligently handled by the said city, and that there was no negligence on the part of the city, or its [fol. 78] officials, which resulted in material loss to the rights of the defendant.

5

That the plaintiff is entitled to judgment against the defendant in the sum of $8,104.79.

Charles C. Cavanah, District Judge.

In United States District Court

Judgment—Filed Jan. 28, 1932

This cause having come on regularly for trial in open court on November 2nd, 1931, the plaintiff being represented by W. G. Bissell and Branch Bird, its attorneys, and the defendant being represented by H. E. Ray and B. E. Stoutemyer, its attorneys; and evidence having been submitted, and briefs having been submitted, and the court having made and entered its findings of fact and conclusions of law,

It is hereby ordered, adjudged, and decreed that the said plaintiff have and recover judgment against the defendant, The United States of America, in the sum of $8,104.79, together with costs to be taxed herein at the sum of $19.50. [fol. 79] Dated at Boise, Idaho, this 28th day of January, 1932.

Charles C. Cavanah, District Judge.

In United States District Court

Order Granting Time to File Bill of Exceptions—Filed Jan. 14, 1932

Upon motion of the District Attorney and good cause appearing therefor,

It is ordered that the defendant United States of America be and is hereby given sixty days from date hereof in which to prepare and file a bill of exceptions in the above entitled cases consolidated for trial purposes.

Dated this 14th day of January, A. D. 1932.

Charles C. Cavanah, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS—Filed March 3, 1932

Good cause appearing therefor,

It is ordered that the above named defendant, United [fol. 80] States of America, be and is hereby given thirty days' extension of time in addition to the extensions hereinbefore granted in these cases for the preparation, service and filing of its proposed bill of exceptions in said cases for appeal purposes.

Dated this 3rd day of March, A. D. 1932.

Charles C. Cavanah, District Judge.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 13, 1932

Be it remembered, That the above entitled causes having been placed regularly in the calendar of the above entitled court for consolidated trial at a stated term of the above entitled court, begun and holding in Pocatello, Idaho, at the October, 1931, term, to-wit, on the 3rd day of November, 1931, before the Hon. Charles C. Cavanah, District Judge, the issue joined in the above stated causes upon the second amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of [fol. 81] the plaintiffs and answer of the defendant thereto in case No. 743, came on to be tried before the said Judge without the intervention of a jury, the action having been brought under the provision of the Act of Congress known

as the "Tucker Act", the plaintiff being represented by W. G. Bissell, Esquire, its attorney, and the defendant by H. E. Ray, Esquire, United States Attorney for the District of Idaho, and B. E. Stoutemyer, Esquire, District Counsel of the U. S. Bureau of Reclamation; and upon the trial of those issues the attorney for the plaintiff offered in evidence certain bonds marked for identification, plaintiff's Exhibits 1, 2, 3, and 4 (see appendix), and offered to prove the ownership thereof in the plaintiffs by calling as a witness CHESTER GREEN, who, being duly sworn, objection was made to his or any testimony, upon ground as follows:

"Mr. Stoutemyer: Before we proceed with any evidence we wish to object to the introduction of any evidence in either of these cases at this time on the ground that it is apparent on the face of the complaint that neither of these cases are cases based upon contract, express or implied, between the United States and the plaintiff, and therefore are not cases within the jurisdiction of the court as defined by Act of Congress; and for the further reason that it is apparent from the face of the complaint that the allegations therein set out do not contain a cause of action.

The Court: I think I passed on that on demurrer. Objec [fol. 82] tion overruled.

Mr. Ray: May we have an understanding that all adverse rulings of either party is excepted to?

The Court: Yes."

Thereupon witness Green testified as follows:

"I am a district manager of the Inter-Ocean Elevators, which is owned and controlled by the Mullen interests, and I live in Salt Lake City, Utah. I remember the incident of the Village of American Falls issuing certain improvement district bonds in 1915 and 1916, which bonds were purchased by Mr. J. K. Mullen at my suggestion.

"Q. Since the time of the purchase of those bonds have you been charged with the duty of looking after collecting the bonds?

A. Yes.

Mr. Stoutemyer: I object to this line of testimony and move that the previous answer be stricken upon the ground his information is based upon oral statements as to who

purchased the bonds, and is incompetent. If those bonds were purchased the record will show who purchased them. It is not the best evidence.

The Court: Objection overruled."

I have been charged with the duty of looking after the collection of these bonds. I am acquainted with the J. K. and Catherine Mullen Benevolent Corporation which was organized in 1925.

"Q. At the time of his organization do you know what if [fol. 83] any assets were transferred to the corporation by J. K. and Catherine Mullen?

Mr. Stoutemyer: I object to that as not the best evidence, and incompetent. The transfer was in writing, if there was one.

Mr. Bissell: These bonds were made payable to bearer

Mr. Stoutemyer: I would like to ask a question in aid of the objection.

The Court: Yes.

Mr. Stoutemyer: Did you see any bonds transferred to Mr. Mullen or to this corporation?

A. I did not see them transferred, no.

Mr. Stoutemyer: We renew our objection to the question as incompetent, and not the best evidence.

The Court: What position do you hold in the Oneida Elevator Company?

"A. I am the district manager, at Salt Lake City, Utah, at this time.

The Court: It is doubtful if that is sufficient to show the transfer of the bonds, or that the bonds are an asset of the corporation."

The defendant thereupon had marked for identification four bonds of $1,000.00 each issued by District No. 1 and marked plaintiff's Exhibit 1; three bonds of $500.00 each and one of $150.00, issued by District No. 2, and marked plaintiff's Exhibit No. 2, and six bonds of $500.00 each, issued by District No. 8, and marked plaintiff's Exhibit No. 3.

Witness Green continued to testify:

[fol. 84] I have seen the bonds (plaintiff's Exhibits Nos. 1, 2, and 3) before; they were delivered to me in person

by Mr. J. K. Mullen, in Gooding, Idaho. I know who the president of the J. K. and Catherine S. Mullen Benevolent Corporation was; it was Mr. Wetbaugh.

"Q. At the time the assets were delivered to you, as whose property were they delivered?

Mr. Stoutemyer: That is objected to upon the ground no foundation has been laid; no way he could know except by hearsay.

The Court: Objection overruled.

Mr. Bissell: Answer the question.

A. What was the question?

(Question read.)

A. There was a memorial endowed, and to aid that Mr. Mullen contributed several million dollars for its assets.

Mr. Stoutemyer: I move that the answer be stricken as incompetent, and immaterial, and not the best evidence.

The Court: Motion denied.

Q. And were the bonds you hold in your hand, Exhibits 1 to 3, for the purpose of identification, delivered to you as the property of any corporation?

A. Yes, sir.

Mr. Stoutemyer: That is objected to, and I would like to ask a question in aid of objection.

The Court: Yes.

Mr. Stoutemyer: When you say when you were asked whether these were delivered as the property of any cor- [fol. 85] poration, did you have any knowledge as to whose property they were other than what somebody stated to you?

A. The party that purchased the bonds delivered them to me.

Mr. Stoutemyer: Answer the question. Are you basing your answer on what someone else said to you?

A. What somebody said to me? Yes, sir.

Mr. Stoutemyer: That is hearsay and incompetent.

The Court: Objection sustained.

Q. Was the party who delivered these bonds to you the party who had organized the plaintiff company and who had contributed its entire capital stock of its organization?

Mr. Stoutemyer: We object to that. The records are the best evidence; also incompetent, irrelevant and immaterial. That is all based on hearsay.

Mr. Bissell: These are not bonds that are required to be transferred in writing. They are bearer bonds.

The Court: Were these bonds delivered to you by anyone as to the property of this corporation in question?

A. Yes, sir.

The Court: Who delivered them to you?

A. Mr. Mullen.

The Court: What did you do with them?

A. I delivered them to Mr. Bissell here.

The Court: The company held them ever since the incorporation?

[fol. 86] A. Yes, sir.

The Court: As the assets of the corporation?

A. Yes.

The Court: You know that to be a fact without someone telling you?

A. Yes, sir.

The Court: Objection overruled.

Mr. Stoutemyer: May an exception be allowed?

The Court: Yes.

Mr. Green continued to testify:

These bonds were first delivered to me at Gooding, Idaho, in 1928.

"Q. Do you know of your own knowledge when J. K. Mullen transferred the property to the J. K. and Catherine S. Mullen Benevolent Corporation?

A. At the time of its organization.

Mr. Stoutemyer: What property? We object to that as the property is not identified. What property do you mean?

Mr. Bissell: This property here.

Mr. Stoutemyer: Those bonds?

Mr. Bissell: Yes.

The Court: Objection overruled, if he knows.

Q. And when were they so delivered?

Mr. Stoutemyer: We object to that on the ground that it is based upon hearsay evidence; if he knows. I will ask if he knows, not what someone told him.

[fol. 87] The Court: Do you understand the question? Do you know, not what someone told you?

Q. (cont.). To the Benevolent corporation.

A. The president of the company told me that he did. I did not see them transferred. To answer Mr. Stoutmyer's question, I did not see the bonds actually delivered to him.

The Court: You know only what the president of the company told you?

A. Yes, sir.

The Court: Objection sustained."

Mr. Green continued to testify:

The bonds in question were delivered to you in person, Mr. Bissell, by myself and Mr. J. K. Mullen at Gooding, Idaho.

"Mr. Bissell: As whose property were the bonds delivered to me for collection by yourself and J. K. Mullen in Gooding, Idaho?

Mr. Stoutemyer: We object to that on the ground that the witness has already shown his knowledge is based upon hearsay, what someone told him.

The Court: The question is, whose property?

Mr. Bissell: Yes.

Mr. Bissell: May I make an observation, Your Honor?

The Court: Yes.

Mr. Bissell: If a certain bond payable to bearer is in the possession of the duly authorized representative of a company and is delivered to an attorney for collection in that capacity that is a prima facie showing of the owner-[fol. 88] ship of the bond, is it not?

The Court: Yes.

Mr. Bissell: That is all I was trying to prove by this witness.

Mr. Stoutemyer: In the first place, the record does not show whether this man was a duly authorized officer of the corporation; and in the second place, if the corporation

owned the bonds someone else did not own them at all, as shown by this witness, and his knowledge is derived from what someone else told him.

The Court: This transfer, you can show that this witness as the agent of the company delivered the bonds to you for collection?

Mr. Stoutemyer: Whether the company owned them or not is objectionable on the ground that his knowledge is what someone told him.

Mr. Bissell: What I am endeavoring to show is that these bonds were delivered to me for collection as the property of that company. The bonds, you will notice, are payable to bearer, and their possession is prima facie evidence of ownership.

The Court: This officer apparently is not a defendant.

Mr. Bissell: I am asking what J. K. Mullen did with these bonds.

The Court: I think you can show they were delivered by this gentleman, delivered to you. Whether they were the property of the corporation or not is another question. I [fol. 89] think you can show what the transaction was. Objection overruled.

(Question read.)

A. The property of the John K. Mullen and Catherine S. Mullen Benevolent Corporation."

Whereupon the plaintiffs offered plaintiffs' Exhibits Nos. 1, 2 and 3 and the same were admitted over the objection of the defendant.

Whereupon counsel for the plaintiffs announced they would now take up case No. 743, being the case of the J. K. Mullen Investment Company vs. United States.

Upon direct examination witness Green testified as follows:

In my capacity as representative of the Mullen interests I had occasion to become familiar with a certain corporation known as the J. K. Mullen Investment Company.

Thereupon fourteen bonds of Local Improvement District No. 9 of the Village of American Falls were marked plaintiffs' Exhibit No. 4 for identification.

Resuming, witness Green testified:

I have seen those bonds before. They were delivered to me at Gooding, Idaho. Those bonds were delivered by me to you (Mr. Bissell) in the presence of J. K. Mullen.

"Q. And as whose property were they delivered to me for collection?

Mr. Stoutemyer: We object to that on the ground that it is not the best evidence, incompetent, and based on hearsay [fol. 90] statements, so far as this witness is concerned, as shown by his previous testimony.

The Court: Objection overruled.

Mr. Bissell: I now offer plaintiff's Exhibit No. 4 for identification in evidence.

The Court: What is the denomination of those bonds?

Mr. Bissell: Fourteen $500.00 bonds.

Mr. Ray: May I ask a question?

The Court: Yes.

Mr. Ray: I will ask you whether these bonds were delivered to you at the same time the other bonds were delivered?

A. In 1928.

Q. All a part of the same transaction, were delivered to Mr. Bissell at the same time as the others that you described?

A. Yes.

The Court: Who delivered these bonds to you?

A. Mr. Mullen.

By Mr. Bissell:

Q. And you were then representing the corporation?

A. Yes, sir.

Q. You were then an offcer of that corporation?

A. Yes, I was a member of that company, as its agent.

Q. When they were delivered to you, why did they deliver them to you?

A. I had handled a good many bonds and a good many papers for both that company and the Colorado Grain and [fol. 91] Elevator Company for the J. K. Mullen Investment Company in through Southern Idaho and different notes, school bonds and other bonds: that under that con-

dition he usually delivered them to me. I was located at American Falls and Gooding, and he always turned them over to me.

Q. Did he deliver these bonds to you and the other bonds, as testified to, to become the property of this company that you represented?

A. To become the property of this company, yes.

Q. And about when?

A. He told me——

Q. (Int.) You received them as an officer of or as a representative of the company with that understanding?

Mr. Stoutemyer: The witness started to say, 'He told me.'

Q. I asked him if he delivered these bonds to him to become the property of this company.

A. Of the Benevolent Corporation, the Investment Company, yes, were the property of the company, he told me.

Q. You received them as an officer and representative of the company under those conditions, did you?

A. I received them not as an officer of this company, no.

Q. For the Mullen Investment Company?

A. The Gooding Mullen Elevator Company. I was district manager of that at that time, which was a Mullen property, a subsidiary of the Colorado Grain and Elevator [fol. 92] Company.

Q. How did they come into the possession of this plaintiff here?

A. Mr. Mullen organized the J. K. Mullen Investment Company as a sort of a holding company for the various interests he was interested in; the Benevolent Corporation he simply organized and transferred the bonds to as a gift to them.

Q. Do you know that to be a fact?

A. That is what he told me."

Mr. Mullen gave those bonds to me personally with my understanding at that time that they were to be the property of that company. All of these bonds that I have testified to were to be the property of—a part to the Investment Company and a part to the Benevolent Corporation.

"Q. You say 'part of them'?

A. Bonds in Districts 1, 2 and 8 were for the Benevolent Corporation, and in District 9 were for the J. K. Mullen Investment Company.

Q. Case No. 743 is the Investment Company and No. 731 is the Benevolent Corporation?

Mr. Ray: We register the same objection to this as we did to the former question, upon the ground that there is not sufficient identification of the property.

Mr. Stoutemyer: In view of the information given by counsel that the delivery was made by Mr. Mullen and not by the president of this corporation or any officer of it, and that the only knowledge that the witness has in regard to the ownership of the bonds was what Mr. Mullen or [fol. 93] someone else told the witness, we wish to make the further objection to any further testimony and move to strike out the previous testimony on the ground it is incompetent and not the best evidence, and hearsay.

The Court: The bonds in these two suits involved here were delivered to you as the property of these two companies?

A. Yes, sir.

The Court: Did you take them and deliver them to Mr. Bissell for collection?

A. Mr. Mullen and myself together.

The Court: You two together?

A. Yes.

The Court: Objection overruled. Motion to strike denied. Anything further?

Mr. Stoutemyer: In stating that these bonds were delivered to you, part of them as the property of one corporation, and part the property of another, do you base your opinion on what somebody told you? You have no knowledge of it other than what was told to you by someone?

A. No, sir.

* * * * * * *

Q. The fact is to your personal knowledge that J. K. Mullen was the gentleman who organized the J. K. and Catherine S. Mullen Benevolent Corporation for the purpose of educating orphan boys and endowed it with a great

many millions of dollars and that he was practically the sole owner of that corporation?

Mr. Stoutemyer: We object to that.

[fol. 94] Q. (cont.). And that as such he was in possession of these bonds and delivered them to you and me for collection?

Mr. Stoutemyer: I think that who organized this corporation and endowed it, if it was organized and endowed, is a matter of record.

Mr. Ray: And immaterial.

The Court: Do you object for any other reason?

Mr. Stoutemyer: Also based on hearsay, so far as his knowledge is concerned.

The Court: He testified these bonds were delivered by Mr. Mullen and he knows they became the property of these two companies involved in these two suits mentioned in these cases. I understand he has testified that he knew that transaction, what it was, and that they were delivered under those conditions and circumstances, other than what Mr. Mullen told him; that they were delivered to him for collection as the property of the plaintiffs. Do I misunderstand his testimony, that he testified to that?

Mr. Bissell: I think that is just about his testimony.

Mr. Stoutemyer: Also that he testified that his sole knowledge as to that is based upon hearsay, that he said Mullen delivered the bonds. His statement that they were delivered as somebody's property is based solely upon statements made to him.

The Court: He has also testified that he is an officer of [fol. 95] the company, and the bonds are payable to bearer. Let us get it straightened out. I understand that in these two suits, a certain number of bonds of certain denominations, and so forth; you are familiar with those bonds, is that correct?

A. Yes, sir.

The Court: How did you come into possession as an officer of these plaintiffs involved in these two suits, of these bonds?

A. Mr. Mullen delivered them to me.

The Court: When he delivered them to you under what circumstances and conditions were they delivered to you and what knowledge did you derive from him?

A. He delivered me the bonds in Districts 1, 2 and 8 and he said these belong to the Benevolent Corporation; and the bonds in District No. 9 were for the J. K. Mullen Investment Company. He has given me many other papers to collect for the Investment Company, and for the Colorado Grain and Elevator Company, and he wanted me to know which of these companies these bonds were for.

The Court: What did you do with them when they were delivered to you?

A. We went up to see Mr. Bissell and turned them over to him.

The Court: You were then representing what company?

A. The Gooding Grain and Elevator Company, a subsidiary of the Colorado Grain and Elevator Company, which [fol. 96] is a Mullen organization.

The Court: You were then connected with the Gooding Elevator Company of Utah?

A. I was district manager of the Gooding Elevator Company.

The Court: How did these bonds become the property of these plaintiffs?

A. The property of these plaintiffs?

The Court: Yes.

A. Mr. Mullen purchased the bonds originally through the investment company.

The Court: The Gooding Investment Company?

A. No, the J. K. Mullen Investment Company, and then he gave a portion of the bonds to the Benevolent Corporation. In other words, these bonds were purchased away back in 1915, I think, and the Benevolent Corporation was not organized until 1925, so that he did not give them to them until about that time, the time it was organized.

The Court: All right, proceed."

Upon examination by Mr. Ray, witness Green testified as follows:

I have never been an officer of the John K. and Catherine S. Mullen Benevolent Corporation or of the J. K. Mullen Investment Company.

"Mr. Bissell: As an employee of the J. K. Mullen system, of which the Oneida Elevator was a part, and the Gooding Elevator company a part, and the Inter-Ocean

[fol. 97] Mills a part, from time to time were you delivered notes, bonds and securities for collection and instructed by the company delivering them to you to what subsidiary corporation those things belonged?

Mr. Stoutemyer: We object to that question on the ground it is incompetent, and it has not been shown that this witness was an employee of the Mullen corporations generally, but only by the Gooding Elevator Corporation.

The Court: Objection overruled.

A. Yes, sir.

Q. Now what corporations were in the Mullen organization and for whom did you make collections?

Mr. Stoutemyer: That is not the best evidence of what was controlled by Mr. Mullen. There is evidence of record of that fact.

The Court: Yes, that goes to the question of identifying the corporations.

Mr. Bissell: Here is the situation we are evidently confronted with, Mr. J. K. Mullen, as the court I think well knows, was interested in many, many corporations throughout Southern Idaho. Among those were the Victory Mills at American Falls, Gooding and Jerome, Twin Falls and Idaho Falls. All of these things were run as separate corporations under a separate name, usually called after the town or county in which they were operating. Therefore, when papers were sent out to their district manager for collection the district manager always was advised as to which particular one of these separate corporate entities [fol. 98] this particular piece of paper belonged; that was the practice, and it goes to establish the ownership. That is the only object of this testimony, and I think it is material in order to develop the idea brought out by Your Honor in your question.

The Court: Answer the question.

(Question read.)

A. Yes, sir.

Q. And were suits brought on these obligations and in accordance with instructions which you received?

Mr. Ray: That is immaterial, Your Honor.

The Court: Objection overruled.

A. Yes, sir.

Mr. Bissell: That is all.

Mr. Stoutemyer: We now move to strike all the testimony of this witness on the ground it is hearsay and not the best evidence; that the witness is incompetent to answer the question.

The Court: Motion denied.

Mr. Stoutemyer (cont.): In respect to the ownership of these bonds and his relationship to these corporations.

The Court: Motion to strike denied.

Mr. Bissell: One more question: Mr. Green, calling your attention to Exhibit No. 4, I will ask you to state whether the bonds therein represented are unpaid?

A. Yes, sir.

Mr. Bissell: That is all.

The Court: You are excused."

[fol. 99] There was no cross-examination of witness Green.

Thereupon Willard S. Bowen was called as a witness for plaintiff in the case of John K. and Catherine S. Mullen Benevolent Corporation v. United States (case 731), and being first duly sworn, his qualifications as an accountant being conceded, in support of the issue as to whether or not the original assessments made by the City of American Falls to meet and retire the special improvement district bond issue in Improvement Districts Nos. 1, 2, 8 and 9 of the City of American Falls was sufficient for that purpose, testified as follows:

I have made four separate audits of the books of the City of American Falls in respect to the said improvement districts, one covering a period from 1915 to February 28, 1923; another from that time to October, 1926, which included an audit of the general fund from the time of the original audit of the improvement district funds; a third to May 3, 1927, and a fourth to May 5, 1931, which is in three sections, one of which covers the special improvement district funds and another the general funds. All of these audits are with reference to the funds of Special Improve-

ment Districts 1, 2, 8 and 9 of the City of American Falls (plaintiff's Exhibits 8, 9 10, 11 and 12 see appendix). Plaintiff's exhibits are carbon copies of my reports to the City of American Falls upon those audits, Exhibit 12 being a report of my general audit ending May 5, 1931.

[fol. 100] Mr. Stoltenyer: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the re-assessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff having never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A re-assessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data would only be material for that purpose. The original assessment the re-assessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of this data and all of these records become immaterial except as to the payment on the original assessment, and that is not material because [fol. 101] not alleged it was not paid, and no claim it was not paid.

The Court: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

Mr. Bissell: That is a report of audit, and the report of an auditor is always a conclusion.

The Court: I will reserve my final ruling on that question as to the admissibility of this evidence.

Mr. Bissell: Subject to that it will be admitted?

The Court: Yes, received subject to final ruling."

Whereupon plaintiffs' Exhibit No. 8 was admitted in evidence.

"Mr. Bissell: I now offer that in evidence, the second audit report.

Mr. Stoutemyer: We object to that on the grounds as stated in the former objection.

The Court: The same ruling and understanding, and it will be received at this time.

* * * * * * *

Q. Handing you a paper which has been marked plaintiffs' Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?

A. Yes, that is a carbon copy of the original report that [fol. 102] was handed to the officers of the City of American Falls.

Mr. Bissell: That is offered in evidence, dated June 6, 1927.

Mr. Stoutemyer: That is objected to on the grounds stated with reference to the previous offers.

The Court: Admitted with the same understanding and reservation of ruling.

* * * * * * *

Mr. Bissell: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in case 731.

Mr. Stoutemyer: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed previous to that and cannot be used to support a claim for the recovery of compensation, which must be based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

The Court: Overruled.

Mr. Stoutemyer: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not

applicable to the issues as presented by the pleadings and by the decision of this court an attempted re-assessment is not valid.

[fol. 103] The Court: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

Continuing, witness Bowen testified:

In making the audit referred to and the reports which have been entered in evidence, I had occasion to examine the original assessment made for the purpose of paying the interest and principal of bonds in Districts 1, 2 and 8 as the same became due and payable with reference to and for the purpose of ascertaining whether or not the original assessments as extended were sufficient to pay the principal and interest upon the bonds as they by their terms became due.

"Mr. Bissell: I will offer this photostatic copy of the bond assessments of the City of American Falls. I assume it is correct.

Mr. Stoutemyer: No objection to that.

The Court: Admitted.

(Marked plaintiff's Exhibit No. 13 in 731.)"

Continuing, witness Bowen testified:

Plaintiffs' Exhibit No. 13 in case No. 731 appears to be a photostatic copy of the bond assessments for Local Improvement Districts 1, 2, 8 and 9 and one of the books which I examined for the purpose of ascertaining whether the original assessment levies were sufficient to pay the interest on these bonds as the same became due and the principal of [fol. 104] the bonds as the same became due according to the terms of the bond.

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

Mr. Stoutemyer: We object to that on the same grounds that were urged to the previous offers.

The Court: Objection overruled. Admitted."

Continuing, witness Bowen testified:

From an examination of the original assessment roll it appears that the assessments originally assessed in said special improvement districts have proven insufficient to pay the principal and interest upon the bonds of those improvement districts in full.

"Q. Did you make a similar calculation as to District No. 2?

A. I did.

Q. From your examination and calculation?

Mr. Stoutemyer: I make the same objection to this question.

The Court: Same ruling.

Q. Was it possible for you to determine solely as a mathematical proposition whether the original assessment made was sufficient to pay the interest and principal of the bonds as the same became due?

[fol. 105] Mr. Ray: I make the special objection to that because it does not cover the estimated cost of construction.

The Court: Objection overruled.

Q. Answer the question.

A. It would be possible to show that on No. 2 as well."

The estimate in the bond assessment book as to the principal of the bonds was $1.51 more than the actual bond issue in District No. 2; that is to say, $1.51 more than the principal. As to the interest, that requires another explanation, which also goes back into District No. 1 and may apply there as well. Taking into consideration the denomination of the bonds and the terms of the assessments the estimate was not sufficient to pay the principal and interest in District No. 2. The result of my calculation as to District No. 8 was the information that the assessment estimated in one district was $14.15 more than enough to pay the principal on the bonds, but the situation as to interest is the same as in Districts Nos. 1 and 2.

"Q. At the time you were engaged in making the audit referred to in the book which you have in your hand as of October, 1926, did you have occasion—did your audit dis-

close that there would be a balance of bonds in District No. 1, 2 and 8 unpaid?

A. That there would be, or that there was now?

Mr. Stoutemyer: We object to that as not applicable to any issue in this case. You asked whether they are unpaid [fol. 106] or not?

Mr. Bissell: Yes, whether any bonds are unpaid.

Mr. Stoutemyer: That is not the best evidence.

The Court: Objection overruled.

Q. Answer the question.

A. There are bonds unpaid in all districts."

As an auditor of the city of American Falls, I took up with some officers of the United States Government the matter of these unpaid bonds of Districts Nos. 1, 2 and 8.

"Q. To what representative of the United States Reclamation Service did you make those reports?

A. Mr. F. C. Bohlson.

Q. What position, if any, did Mr. Bohlson occupy in American Falls at this time, if you know?

Mr. Stoutemyer: We object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. I am not able to state what position except in a general way.

Q. What was that position in a general way?

A. Well, he was apparently looking after the condemnation details, condemnation of the rights of way.

Q. And arranging for the payment of taxes to the county and apparently handling the accounts in——

Mr. Stoutemyer (int.): That is not within the knowledge of this witness.

[fol. 107] Q. Do you know if Mr. F. Bohlson was an employee of the United States Reclamation Service at American Falls?

Mr. Stoutemyer: Not in responsible charge; a clerk in the office.

Mr. Bissell: I wondered if there was any real controversy about that.

Mr. Stoutemyer: We are willing to concede that he was a clerk in the office at American Falls, also a clerk in the Reclamation office in American Falls. He will go on the stand.

The Court: The objection is well taken.

Mr. Bissell: It is now conceded that Mr. Bohlson was a clerk in the employ of the United States Reclamation Service at American Fall, Idaho?

Mr. Stoutemyer: You have got the record as to that, Mr. Ray?

Mr. Ray: That is agreed to.

Q. As auditor of the City of American Falls, did you take the matter of these unpaid bonds up with Mr. Bohlson?

A. I did.

Q. Did you at that time inform Mr. Bohlson as to the amount of bonds due?

Mr. Stoutemyer: We object to this question on the grounds previously stated, incompetent, irrelevant and immaterial.

Mr. Bissell: It is a question whether or not the government acted in good faith in the purchase of those lands if the man in charge of their office had information of the fact that these bonds were due.

[fol. 108] Mr. Stoutemyer: The question is whether this man was in charge in such a capacity to bind the government.

The Court: The record is not satisfactory on that point.

Objection sustained.

Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

Mr. Ray: That is immaterial, and not binding on the government, no matter what he said.

Mr. Stoutemyer: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

The Court: If you make a connection showing this clerk's statements were binding I will allow it.

Mr. Bissell: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

The Court: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question."

Continuing, witness Bowen testified:

Mr. Bohlson, a clerk in the office of Construction Engineer Banks, said that there was held in some sort of a fund approximately $13,000.00 for the purpose of paying the assessment that had not been paid on the land that has [fol. 109] been paid on the land that has been purchased. Mr. Bohlson's statement included District No. 9 in case No. 743 of the J. K. Mullen Investment Company v. United States.

Upon cross-examination, witness Bowen continued to testify as follows:

From my report of October 31, 1926 (plaintiff's Exhibit 9), it is shown that the actual collections made by the city exceeded the amount originally assessed on the assessment roll (plaintiff's Exhibit 13), in District No. 1 by approximately $1,871.44; the cause or source of that excess collection was largely, I presume, penalties and interest on delinquent taxes less the collection fee of 1½% paid to the county for handling these tax collections. Many of the lot owners, prior to the time the United States purchased the property, allowed their taxes to become delinquent until the United States purchased, when they paid up not only their assessments but in addition the penalties and interest on delinquent taxes, which accounts for this excess collection. There are similar excess collections in other districts. The amount of such excess collections, as was not lost in the defunct bank, was fully applied to the payment of principal and interest upon these bonds, with the exception of a slight misapplication of $12.00. In theory the original assessments were correctly calculated to pay out the bonds and interest in ten years in annual installments, but, due to the fact that the bonds were not small enough in denomination, even had they had the funds on hand they [fol. 110] could not have redeemed them.

"Mr. Ray: Why?

A. For instance, on the original issue of No. 1, for $24,000 would pay $2,400 a year; the bonds were in denomi-

nations of $1,000. Each year you could have taken up $2,000 worth of bonds, and the first year you would have had $400 of idle money to carry over until next year; the next year you would have had $2,400 more, plus the $400, which would have been $2,800. You could have taken up $2,000 worth of bonds and $800 left over, which was idle money, with which to that extent to resume the interest, according to the original theory.

By Mr. Stoutemyer:

Q. As I understand you then, the discrepancy or deficiency was due largely to the denominations in which the bonds were issued, and to the fact that the optional date of payment was not so provided as to conform to the date of collections, with the result that the money was held idle in the treasury while interest accumulated on the bonds, is that the situation?"

Witness Bowen continued to testify as follows:

I do not believe the delay in payment of the bonds after the money was collected from the lot owners was the principal cause of the default in the payment of the bonds. There was considerable loss both in principal and interest on the bonds due to the failure of the First National Bank of American Falls in which the city treasurer, after collection of local improvement district assessments, had de- [fol. 111] posited them; this loss would affect the interest item in that it would have tied up that money so that it could not have been used to redeem the bond principal or the bond coupons, the latter of which would be paid out of the first funds coming in; the principal would be deferred until there were sufficient funds to retire it, all the time drawing interest as the funds tied up in the bank drew no interest while the bonds outstanding continued to accumulate interest. There was considerable delay in the payment in addition to that which resulted from lack of conformity between the denominations of the bonds and the amount of money that came in from time to time; however, I believe, that was not so serious. Of course the heavy tax collection period—that is the time at which the city would receive its proceeds from the heaviest tax payment—would be well around the first of the year; the interest due

on these bonds was due, one on February 1 and another on February 15, as I recall, and two of them March 1, so that it was entirely possible that considerable sums of money might remain idle in the city treasury from the time it had been received from the fall tax collections up to the time it could be applied to the bonds, possibly a period of two months. One of the reasons for the trouble was largely due to the fact that the bonds were in such large denominations that they could not be conveniently paid out of the money as it came in without delay in holding money idle in the treasury. Another reason which con- [fol. 112] tributed to some extent was in issuing the bonds they did not designate a convenient and economical date for the exercise of the option to pay off the bonds. If the assessment roll was made up and the assessments made prior to the time that the bonds were issued and sold as required by statute, and if the bonds had been issued in smaller denominations and with a convenient and economical option payment date, that difficulty would have been avoided. The money that had been collected from the lot owners in these assessments was deposited by the treasurer of American Falls in the bank which failed. There was on deposit by the city treasurer in the First National Bank of American Falls when it failed:

$1,168.73	as to	Improvement	District	No.	1
60.51	"	"	"	"	2
2,155.95	"	"	"	"	8 and
3,031.15	"	"	"	"	9.

The time elapsing between the time of closing the bank and the time of partial recoveries of deposits was as follows: The bank failed to open on February 7, 1923. The first proceeds of liquidation were paid in October, 1926. The second partial payment of proceeds of liquidation was April 4, 1927, and a still further recovery was made December 6, 1927. A part of the deposit was never paid. The loss of interest during the time these funds were tied up in the bank and until the times of partial payment is one cause for the default on the payment of the bonds as the bonds continued to draw interest at 7% but no interest was [fol. 113] paid on these deposits until the partial payments were collected and placed on deposit with another bank at 2% interest.

A substantially greater portion of bonds in District No. 9 (case No. 743) remain outstanding and unpaid than in any of the other districts, and in that district a substantial part of the original assessment has never been paid upon lots outside the reservoir site, which is not true in those districts (Nos. 1, 2 and 8) where the United States purchased all of the lots.

"Q. In one of your reports, Mr. Bowen, you refer to a special deposit which you set up as a collection of a judgment against Sam Forter. Who was Sam Forter?

A. Sam Forter, as I understand it, was a contractor who let——

Mr. Bissell: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that being a cause of action for defective construction of sidewalks, in District No. 9. That is not material here.

The Court: Objection sustained, but not as to No. 9.

A. Sam Forter was a contractor who constructed all, or part at least, of the sidewalks in District No. 9."

In addition to the several bond funds in the bank when it closed, there was a special deposit of a balance of an amount recovered from a contractor who constructed the [fol. 114] improvements in all or part of Improvement District No. 9. This amount was originally $2,916.53 and was paid to the City of American Falls on January 3, 1917. This $2,916.53 collected from Sam Forter, the improvement contractor, was not paid upon any part of the bond issue or indebtedness.

"Q. To what extent could the default of the bonds in that district have been reduced had that collection been promptly applied to the reduction of the indebtedness of the sidewalk district instead of held in the special account and used for other purposes?

A. Well, I can best answer that by saying that at the time the First National Bank of American Falls closed, there was $438.75 in that account, and had that been paid at that time, or before that time——

Q. (Int.) My question is, how much would it have been reduced if the amount of this collection of Forter of

$2,915.00 been promptly applied to reduce the bonded indebtedness. That was the question.

Mr. Bissell: That is objected to as immaterial. The bonds are in evidence and only payable at a certain time.

The Court: Objection sustained to the form of the question."

Continuing, witness Bowen testified on cross-examination:

The books of the city show that the general idea with reference to the payment of these special improvement dis-
[fol. 115] trict bonds was that they ran for 10 years with an option to pay them earlier than that date. Partial payments have been made upon the principal of these bonds here in evidence. A partial payment of $500 was made on bond No. 21 in Improvement District No. 1; a partial payment of $325 on bond No. 38 in District No. 8, and a partial payment of $350 on bond No. 38 in District No. 9.

On re-direct examination, witness Bowen continued to testify as follows:

On collection of the assessments in these special improvement districts, the city ultimately collected approximately $1800 in excess of the amount of the original assessment; the amount of $1800 is arrived at in this manner: The receipts from the county treasurer, including taxes, penalties and interest, receipts direct from the Reclamation Service and receipts direct from others totaled, and deduct from that the amount set up on the tax rolls as the original estimate for principal and interest. The source of the excess payment was interest and penalties and to some extent it offset the extra interest which accrued on the bonds by reason of their not being paid promptly.

In one of my reports (plaintiff's Exhibit No. 9) I refer to a special deposit set up as a collection of a judgment against Sam Forter who, as I understand it, was a contractor who constructed all or a part of the sidewalks in District No. 9. The amount of this judgment, $2916.53, was paid to
[fol. 116] the city by Sam Forter and placed in this special fund on January 3, 1917. This fund was carried until disbursed in part as follows:

O. R. Baum, for services	$600.00
O. F. Crowley, for services	150.00
American Falls Press, printing and publication	1486.80
R. J. Newell, for labor	37.00

leaving a balance in April, 1917, of $642.75. At the time the bank closed, there was a balance in the fund of $438.75. The difference between that and the $642.75 which existed in April, 1917, we were required to estimate inasmuch as it could not be directly explained, a fund of some $200.00. At the time this money was received by the city, on April 14, 1917, there were not at that time any bonds due and payable because a year had not elapsed since the issuance of the bonds. It would have been possible at that time to have immediately applied that money to the payment of interest or principal on these bonds, but not according to the set-up or the terms of the bonds. I cannot tell just the amount of money that Districts 1, 2, and 8 lost by reason of loss of interest and of principal from the failure of the First National Bank of American Falls; the amount of money that is still unavailable by reason of the bank failure is—

For sewer district No. 1	$131.25
" " " No. 2	6.79
In sidewalk district No. 8	242.12
or a total of	$380.16

[fol. 117] computed to April, 1931. The net loss from the same cause in District No. 9 is $340.42, and in the special fund $49.28.

The difference between the principal of the bond issues of the improvement districts and the amount set up for principal on the assessment roll is as follows:

	Principal of bonds	On assessment rolls
District No. 1	$24,000.00	$23,638.04
" " 2	7,150.00	7,151.51
" " 8	21,506.05	22,040.20
" " 9	25,219.25	25,216.78

There was no additional amount set up of 1½% to pay for the collection of the principal; that is the fee which I think the statute allows the county for collection.

On recross-examination, witness Bowen continued to testify as follows:

I did not make any calculations as to the amount of interest lost by reason of the bank failure but I know in a general way that there were a number of years when the money was tied up and no interest payment received. In making the set-up upon the assessment roll on account of the several improvement districts, there was no sum set up for payment of the first year's interest on the bonds of District No. 1; and in Districts 2, 8 and 9, this item was not originally set up but was set up in the second year in addition [fol. 118] to the first year's interest. This fact naturally started the payment of interest and principal off upon an incorrect basis and required the city to use money received for the principal each year for the payment of interest.

"Q. And then would you say from an examination of your books and the set-up for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?

A. That was very largely responsible.

Q. That is practically responsible, is it not, which really caused this condition?

Mr. Bissell: We object to that as immaterial, calling for a conclusion, and hearsay.

The Court: Objection sustained as leading."

Continuing, witness Bowen testified as follows:

The penalty received in collection of delinquent taxes will not offset the accumulated interest on the bonds; the rate of penalty was 6% part of the time and 2% part of the time.

"Q. What do you mean by two per cent?

A. On the whole amount of taxes.

Q. There is no penalty on delinquent taxes as low as two per cent, is there?

Mr. Bissell: I object to that as calling for a conclusion and immaterial.

The Court: Objection sustained."

[fol. 119] Whereupon, the plaintiff to support the issues made herein—that an attempt had been made to re-assess the property within the special improvement districts but had been prevented from so doing by action of the defendant United States in taking title to the property within said improvement districts, thereby rendering said property tax exempt—produced as a witness T. H. DAVIE, who, being duly sworn, testified as follows:

I am the city clerk of American Falls and in custody of the ordinance book of that city. I have here original Ordinances Nos. 122 to 125 and also copies thereof.

(Whereupon the copies were offered as substitutes for the originals, and marked plaintiff's Exhibit 16—see appendix.)

"Mr. Bissell: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Press, which was the official newspaper of the City of American Falls, which has each of the ordinances printed verbatim and in full.

Mr. Stoutemyer: We object to that on the ground it has not been shown that the United States acquired title and that the attempted re-assessment was void and already discharged in this case, and therefore immaterial.

The Court: You do not object on the ground that they are not ordinances of the city, and passed by the city?

Mr. Stoutemyer: No.

The Court: Objection overruled."

[fol. 120] Witness Davie, resuming, testified as follows:

I was the owner of property in American Falls and in the reservoir site, and sold my property by contract to the United States about 1925. At the time of settlement someone in the Reclamation office, now unknown to me, explained the purpose of withholding a sum of money from the purchase price.

"Q. At the time you made settlement with the Government, did the party having charge there of the paying out of money, explain to you why a certain sum of money was being withheld from you?

A. Yes.

Q. What explanation did he give?

Mr. Stoutemyer: We object to this; it has not been shown that any such statement was made by any one who had any authority to bind the Government.

The Court: Let him state who it was, if he can.

Q. Do you remember which one of those three gentlemen it was?

A. No, I do not.

The Court: Are you clear that it was one of those three gentlemen named?

A. I know it was a gentleman in the reclamation office.

Q. And who were in there in charge of that work, if you remember?

A. Mr. Banks, Mr. Bickel and Mr. Bohlson. I think there was also Mr. Anderson. He was in there at that time; he [fol. 121] was a clerk of some kind.

Q. Mr. Anderson have anything to do with buying the property?

A. No.

Q. Was the gentleman with whom you settled one of the three whom you have named?

A. Yes.

The Court: Objection overruled. Answer the question."

Witness Davie continued to testify:

It was my understanding that it was withheld to take up the unpaid assessments upon the property.

On cross-examination, witness Davie continued to testify:

This money which was withheld was eventually paid over to me some two or three years later. I think I understood that this money was withheld temporarily.

Whereupon T. C. Sparks was introduced as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

I am an abstracter by occupation, have handled some real estimate transactions and am at present mayor of American Falls. I have also been on the city council from

1919 to 1921 and from 1923 to 1927; I was a property owner in the old town of American Falls at a time when the United States Reclamation Service was constructing the American Falls Dam. During that time F. A. Banks [fol. 122] was the engineer in charge and he had assistants in the office during that period, a Mr. Bickel and a Mr. Bohlson, and Mr. E. P. Anderson. As an official of the city and as a property owner, I talked with Mr. Banks and the several men in his office regarding the question of payment of these improvement district bonds. When settlement was made for my property, there was an amount held up to cover contingencies arising in case there was not enough money from these sidewalk and sewer assessments to retire the bonds; this was in addition to the amount held back for the payment of current taxes, a mortgage and the payment of the balance of the ten annual assessments on my sewer and sidewalk.

"Q. Was there an amount of money held up from you as an individual and property owner by the government for the purpose of retiring these sidewalk and sewer bonds?

Mr. Ray: That calls for the conclusion of this witness.

Mr. Bissell. It calls for a fact.

The Court: He can state whether that was a fact or not. Overruled."

Resuming, witness Sparks testified:

There was an amount of money held up for that purpose. I had occasion to have personal knowledge as to whether or not the government was holding out similar sums of money from other sources and it was commonly known around town that a portion of the money due each prop- [fol. 123] erty holder in the district was withheld by the government for that purpose.

"Q. How long did the government retain this money which they held out on you, telling you that it was for the purpose of paying these bonds?

Mr. Ray: I don't think that they ever told him that in the testimony.

The Court: Yes, I think so. Did you say that?

A. Yes. For the purpose of paying the bonds.

The Court: Overruled."

Resuming, witness Sparks testified:

I could not say exactly in my case how long the money was held out but it seems to me it was between 18 months and 3 years. The old townsite of American Falls was not all flooded at once; portions of American Falls in speical improvement districts 1, 2 and 8, I would say, were flooded late in the fall of 1925 or winter of 1925 and spring of 1926 as the water rose during storage. I think the Grand Hotel, as I recall, was the last building to be moved in the later winter of 1925 or perhaps in the spring of 1926; my house was about the fifth house left on the townsite and I moved it off in April, 1925, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings.

On cross-examination, witness Sparks continued to testify as follows:

[fol. 124] The lands purchased by the Government for reservoir purposes were partly secured by purchase and partly by condemnation. I believe there were two different kinds of standard form of land-purchase contract used. Defendants' Exhibit 1 is one of the forms used. (Defendant's Exhibit 1 admitted in evidence without objection—See Appendix). Paragraph 7 of Defendant's Exhibit 1 provides that the government may deduct from the purchase price the amount of valid liens. Some deductions were made in purchases about the year 1923; the reassessment was not made until 1928, when there was talk about the setup not being sufficient and about a reassessment. The amount of these temporary suspensions were returned without comment to the land owners; I know they were returned and that under the terms of paragraph 7 of the contract (Defendant's Exhibit 1) such deductions could legally be made.

On redirect examination, witness Sparks proceeded to testify as follows:

Paragraph 7 of the contract (defendant's exhibit 1) provides that the Government may withhold the money for any liens or encumbrances existing against the property; I would not say the government withheld sufficient money to discharge these bonds in all instances but in a very

great number of them. I do not know who eventually decided the question as to whether or not these bonds were liens.

[fol. 125] Recalled, and resuming as a witness for the plaintiff, witness Sparks testified:

As an abstracter I have prepared at your request a list of the lots in Improvement District No. 9, which have been taken over by the government, together with an abstract of the reassessments reassessed against said lots under the reassessment ordinance; that is the paper marked Plaintiff's Exhibit No. 4 in case No. 743.

"Mr. Bissell: I offer this, which is certified by the abstracter, and made as such, showing the property taken over and inundated in district No. 9, together with the amount of the reassessment under the ordinance.

Mr. Stoutemyer: I do not object on the ground it is a copy, but we do object on the ground it is incompetent, irrelevant and immaterial, for a number of reasons, and including the fact that the attempted reassessment occurred a number of years after the Government purchased the property and is void for all purposes; for the further reason there is an entire lack of showing of the necessary facts under the state statute to authorize a reassessment placed against privately owned property.

The Court: Objection overruled.

Mr. Bissell: Exhibit No. 4 in case 743."

Resuming, witness Sparks testified:

I am familiar with the boundaries of improvement districts 1, 2 and 8. All of district 1 and all of district 8 and most of district 2 were inundated by the building of Ameri-[fol. 126] can Falls dam and reservoir. A small portion of the high land which borders the water line of the reservoir in district No. 2 was not inundated; I have been an abstracter for 16 years in American Falls and while not engaged in the general real estate business, I have handled property for non-residents on some occasions; I have become acquainted with the value and location of various properties in American Falls and in my opinion the uninundated portion of district No. 2 would be worthless for residence or business purposes.

No cross-examination.

O. F. Crowley, being called as a witness on behalf of the plaintiff and being duly sworn, testified:

I reside in American Falls and have been City Treasurer since 1923 or 1924. I recall the circumstances of building the American Falls Dam and prior to that time I was a property owner within the reservoir site. I am acquainted with Mr. Banks, the project engineer, and Mr. Bohlson, clerk, and Mr. Bickel, who were in charge of building the dam and acquiring the right of way. In dealing with them for the sale of my property there was a sum of money withheld from the purchase price when settlement was made and paid over to me about two years later. It was explained to me why the money was being withheld by whom, I don't remember, but I think it was Mr. Bickel who was one of the men in charge of the dam and with Mr. Bohlson who had to do with securing the right of way.

"Q. Did the party withholding, or with whom you were [fol. 127] settling on behalf of the Government, then and there state why the money was withheld.

A. They did.

Mr. Stoutemyer: We object to that; there is no showing that the person he talked with had any authority to bind the Government.

The Court: Can't you state with whom you were dealing with there in your own transaction, what it was and what was done? Three men were there, you say?

A. Your Honor, I know what was done, but the reclamation people were frequently in my office on tax matters and different things, and it is hard for me to recall any individual transaction.

Q. With any one of those three men?

Mr. Stoutemyer: You are now testifying as to your own piece of property, you say? Do you know whom you dealt with?

A. I think it was Mr. Bickel. I would not swear to that.

The Court: You will not make that statement; you will not swear to that?

A. I would say I think it was Mr. Bickel that the statement was made by, but it is quite a while ago.

The Court: Who was he?

A. One of the reclamation officials who had charge of the construction of the dam.

Mr. Stoutemyer: Was he one of the men in charge of the dam?

[fol. 128] A. He was one of the men in charge of the dam, yes.

The Court: What else did he do; did he have anything to do with securing the rights of way there?

A. I think that he had to do with the securing of the right of way, if I am not mistaken, he and Mr. Bohlson.

The Court: Go ahead."

Resuming, witness Crowley testified as follows:

I was told that an amount sufficient to take up the delinquent payment on the sewer and sidewalk districts was withheld and in addition an amount to take up any deficiencies that might arise, such as delinquent bonds or bonds which were not paid.

On cross-examination, witness Crowley testified:

I believe my contract with the government provided that money might be deducted from the purchase price in the amount of valid liens. I agreed to convey clear title free from liens and incumbrances for a specified amount. A reassessment was proposed in district No. 9 in 1928, but I don't know of any attempted or proposed reassessment in the other districts. When it was ultimately decided that the reassessment was not a lien, I think the money was paid to all the property owners; I suppose you would call the withholding of money a temporary suspension at the time, pending a decision.

[fol. 129] On redirect examination, witness Crowley testified:

I think I made a contract with the government in 1924 and that the repayment was made somewhere along two or three years later.

In response to questions by the court, witness Crowley testified:

I am familiar with the area covered by these various special districts here involved in the bonds. The entire area was not covered by water under the reservoir. A large portion of No. 9 was not covered and I think a portion of sewer district No. 2 is not uniformly covered, but all that

portion of the town, or the lower part of it, was not covered as I recall it, not flooded.

"The Court: I assume before the case is closed you will explain to the court what districts are included in this reservoir site.

Mr. Bissell: I think the pleadings allege that districts 1, 2 and 8 are inundated and that is admitted by the answer and a portion only of district No. 9. It is plead that 1, 2 and 8 are totally inundated and it is admitted.

Mr. Stoutemyer: That is not correct. We bought all of those portions of 1, 2 and 8 but did not flood them."

On recross-examination, witness Crowley testified as follows:

As City Treasurer, I am familiar with the assessment book or assessment roll, a photostatic copy of which is in [fol. 130] evidence (Plaintiff's Exhibit 13). The marks upon the assessment book opposite certain lots, "Assessment paid", with no assessment carried out thereafter represent the assessments paid; the levy for sidewalk being paid at the time the sidewalk was constructed. I would say that the fact that assessments were paid in full upon some of the lots, when the improvement was built accounts for the discrepancy between the total for the ten years' assessments and the total amount of the bonds.

Upon redirect examination, witness Crowley testified as follows:

All of districts 1 and 8 were inundated by the reservoir of American Falls, and I think there was a very small portion of district No. 2 that was above the water line; I could not say the acreage but just a slight point that ran down into the lake.

Defendant's Motion for Nonsuit

Whereupon plaintiffs announced that they rest, and the defendant then and there moved the court for a non-suit as and upon grounds as hereinafter set forth; and the said Judge then and there denied said motion. Thereupon the counsel for said defendant excepted to the ruling of the court as is made to appear more particularly hereinafter.

Whereupon, in order to controvert the issue that there was an implied contract between the plaintiffs and the United States and the issue as to whether plaintiffs' com- [fol. 131] plaint was filed within six years of the time that the United States took title to the property in the improvement districts where the cause of action, if any, arose, Mr. F. A. BANKS was called in behalf of the defendant, and being duly sworn, testified as follows:

I am a construction engineer of the United States Bureau of Reclamation and in that capacity was in charge of the construction of the American Falls Dam and took possession of the city lots purchased by the United States. I took possession of the first piece of land in 1920 or early in the spring of 1921 and the balance of the lots required for reservoir site were acquired by the defendant the United States by purchase and condemnation between that time and the year 1926 when the dam was completed and some water stored behind the same. The lands in the improvement districts involved in this case were only partially flooded in 1926, but the reservoir was not filled until 1927.

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

Mr. Bissell: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

The Court: Objection sustained.

Mr. Stoutemyer: We offer to prove by this witness that the time this property was taken by the Government, for [fol. 132] instance, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact have such title, and this witness never recognized the bondholders as the owner or having any interest in that property at the time it was taken for the Government of the United States.

The Court: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or any interest therein?

A. No, sir.

Mr. Bissell: I object to that and move to have the answer stricken. I object to it as immaterial.

The Court: Objection sustained."

Resuming, witness Banks testified:

At the time of taking possession of those lots as engineer in charge of construction, I claimed title to said property as the title of the United States prior to the time it was flooded, and did not recognize the bondholders of special improvement district bonds as the owners of said lots or of any interest therein.

I have never stated that the United States withheld from [fol. 133] the purchase price due to lot owners any money for payment of bonds, nor have any of my subordinates been authorized to make any such statement, or made any such in my presence. There was no money withheld from the purchase price due vendors or lot owners for the payment of any bonds. On some of the lot purchase transactions a sum of money was withheld from said lot vendors, temporarily, pending my receipt of a legal opinion as to whether or not a proposed reassessment against lots within said improvement districts would constitute such a valid lien which our land purchase contracts authorized us to pay and deduct from the purchase price. The money temporarily suspended was paid to the land owners.

"Q. Was that after an opinion had been rendered that the reassessment was not a valid lien?

Mr. Bissell: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion.

The Court: Objection sustained."

Resuming, witness Banks testified as follows:

There was a provision in the contract that permitted the withholding of the amount of liens from the purchase price and that liens could be retired by either the record owners or the Government. There was no provision under which anything could be withheld unless there was a valid lien.

[fol. 134] On cross-examination, witness Banks testified:

Most all of the contracts of purchase were taken in my name. I began to make those contracts for the purchase of property down there as early as 1920, and I think there was a large number of the contracts executed in 1920. As early as 1920 the government, acting through me or under my direction under the provisions of section 7 of the contract, did not hold out an amount of money sufficient to pay these special improvement district bonds. In the first contracts there was held out enough to pay the liens of record and in the later contracts there was enough held out to meet any reassessment that might be made on account of any liens. This money was retained by the government to pay any valid liens of any kind that might be established. I could not say as to whether or not there was a part of that money held out from the dates of the respective contracts of purchase. The moneys were not held out until the voucher was paid, which was some time after the contracts were executed. Any time the United States government was paying for a piece of property purchased after the year 1925, we held out an amount of money sufficient to pay off any valid reassessment that might be made. I think that the government retained the sum of from $13,000 to $14,000 until some time in 1929 before they paid it to the land owners; it was withheld for the purpose of paying any reassessments that might be held valid liens. When the United States took the property over, it was done by purchase from the individual [fol. 135] citizen. When we took it over we asserted it was the property of the United States by reason of purchase from the individual citizen. There was some of the property in the city of American Falls within the reservoir in improvement districts 1, 2, 8 and 9 condemned. There is a record of it. I think there was a condemnation suit against John Kosanke under the dam proper. There was quite a number, perhaps 12 or 14 pieces acquired by condemnation under the dam proper, that was to be covered by the dam. At the time I was making the purchase of only a part of the lots, I had knowledge of the fact that these improvement district bonds were outstanding and unpaid. I heard that this was true with respect to some of the lots.

F. C. BOHLSON, a witness produced by and on behalf of the defendant, being first duly sworn, testified as follows:

I was employed in connection with the American Falls project in a capacity to negotiate the purchase of property for the right of way of the American Falls dam and reservoir and to see that payments were made. My official position was that of clerk. I do not know of ever having stated that any of the money withheld was being withheld for the purpose of paying bonds.

On cross-examination, witness Bohlson testified:

I presume that I gave out checks to settle with the various owners of land for their property. In some cases there [fol. 136] was a certain sum of money deducted from each check but not in all cases. The purpose of deducting the money from each check was to protect the United States against the possibility of other assessments in the various improvement districts. One could not tell whether the sum withheld was sufficient or not for that purpose, but we held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of the existing bonds. This was not necessarily explained to each and every lot owner. The vouchers that the lot owners signed gave the details of that quite extensively to most of them. The vouchers that the land owners signed specified the amount of money withheld and what it was for. I do not have any of these vouchers in my possession. I think the money that was held out was more for the purpose of protecting the United States against any claim that the city of American Falls might have. Personally I don't know that the bondholders had anything to do with it. That never was put into any of the abstracts of title. I knew that there were outstanding bonds and while I did not discuss it with all of the members of the reclamation force. I know some at least knew that there were outstanding bonds. I presume I discussed it with Mr. Banks and very likely with Mr. Bickel. All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds were outstanding along some [fol. 137] time after the reports to that effect got out that the bonds were not all being retired. Prior to that we did not know that. I knew that after 1925. I could not say that the bulk of the purchases were after 1925 but we started in 1920 and got through in about 1926. Sometimes we were

more active than at other times. Somewhere between $10,000 and $15,000 was held out by the government.

On redirect examination, witness Bohlson testified:

This money was withheld pending a decision as to whether there was a valid lien against these lots or not.

Whereupon, after the submission of the testimony of Chester Green, Willard S. Bowen, T. C. Sparks, T. H. Davie and O. F. Crowley, which were all of the witnesses testifying on the part of the plaintiffs, and all of whose testimony is substantially as hereinbefore set forth, and the introduction by the plaintiffs of their Exhibits Nos. 1 to 14, both inclusive, and 16, pertaining to case No. 731, and Nos. 1, 3, 4, 7, and 8 to 13, both inclusive, and 16, pertaining to case No. 743, which were all of the exhibits introduced on behalf of the plaintiffs, as hereinbefore set forth, and the introduction of defendant's Exhibit No. 1, counsel for the plaintiffs announced that the plaintiffs rest.

DEFENDANT'S MOTION FOR NONSUIT

Whereupon counsel for the defendant moved the court to grant a non-suit because of the failure of the plaintiffs to [fol. 138] prove a cause of action against the defendant in either of said actions in the following particulars:

That the evidence wholly fails to show that the plaintiffs are or have been the owners of any property at all;

That the evidence wholly fails to show that the property claimed by the plaintiffs, if any, was acquired prior to the time that the land within the several special improvement districts was acquired by the defendant for reservoir purposes; that the testimony of plaintiffs' witnesses show that if the plaintiffs acquired any property alleged to have been injured by the action of the defendant, it was acquired long after the lands within said improvement districts were purchased by the defendant;

That the evidence wholly fails to show that thhe plaintiffs or their respective predecessors in interest had any lien upon the property within said improvement districts; the evidence introduced on behalf of the plaintiffs shows the original assessments levied upon property within said

special improvement districts to have been paid in full and in some instances overpaid; the evidence further shows that no reassessment has been levied against the parcels of land within said improvement districts, in accordance with the statutes authorizing such reassessment, and in no event prior to the time the defendant acquired title to and possession of the property within said special improvement districts;

That the evidence further fails to show that the failure [fol. 139] of payment of the bonds alleged to have been owned by the plaintiffs resulted from any action of the officers or agents of the defendant; that on the contrary the evidence shows that the failure of payment of such bonds resulted from numerous causes out of control of the defendant, among which were acts of the officers of the city of American Falls over which the defendant had no control or authority. The testimony shows that the acquisition of the property within said special improvement districts by the defendant resulted in the payment of a larger sum upon said bonds than would otherwise have resulted if said property had not been so taken by the defendant.

That the evidence further fails to show that the officers of the defendant at the time of taking the property within said special improvement districts recognized the holders of bonds of such districts as the owners of the several lots and parcels of land therein, or that said officers did not take and hold said property under claim of exclusive ownership in the United States.

"The Court: Motion denied.

Mr. Ray: Note an exception, Mr. Reporter."

Be it further remembered that thereupon the court took the decision of said cases under advisement until January 13, 1932. Whereupon the court rendered and filed his Memorandum Opinion deciding in favor of plaintiffs and against the defendant. Be it further remembered that on [fol. 140] January 14, 1932, the court made and entered its order in each of the above entitled cases allowing the defendant sixty days from the date thereof, to-wit, sixty days from January 14, 1932, to prepare, serve and file a draft of defendant's proposed bill of exceptions. Be it further remembered that the court on January 23, 1932, made and filed its special findings of fact and conclusions

of law, and the counsel for the defendant did thereupon except to the ruling of the said court in the making of said findings of fact and conclusions of law, said exceptions to be included in the bill of exceptions filed herein and is assigned as follows:

The facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment. The court received and admitted incompetent, immaterial, irrelevant and hearsay evidence in support of the findings of fact; the court refused to receive and admit competent, relevant and material evidence offered in behalf of the defendant, which should have been the basis of the court's findings of fact; there was no substantial evidence to sustain a finding in favor of the plaintiff and against the defendant; the conclusions of law as filed by the court should be in favor of the defendant and against the plaintiff.

And be it further remembered that thereafter on the 12th day of February, 1932, the defendant filed and served [fol. 141] its Motion to Correct the Findings of Fact to conform to the evidence; be it further remembered that on February 22, 1932, at the Boise chambers of the court, the plaintiffs and the defendant being then and there represented by their respective counsel, the court denied the motion of the defendant to correct the findings of fact to conform to the evidence and declined to correct its findings of fact and conclusions of law in the manner pointed out in said objection or at all; and counsel for the defendant did thereupon except to the ruling of the court in overruling said motion and in refusing to amend its findings of fact and conclusions of law, and the exception is allowed accordingly.

Received copy Mar. 18th, 1932.

W. G. Bissell.

APPENDIX TO BILL OF EXCEPTIONS

The following exhibits were admitted and are referred to in the foregoing testimony:

Plaintiffs' Exhibit 1 in case No. 731; four bonds of Local Sewerage Improvement District No. 1, American

Falls, Idaho, $1,000 each, numbered 21, 22, 23, and 24, respectively, and dated July 15, 1915; maturity date July 15, 1925.

Plaintiffs' Exhibit 2 in case No. 731; four bonds of Local Sewerage Improvement District No. 2, American Falls, [fol. 142] Idaho, 3 for $500 each and one for $150.00, numbered 12 to 15, inclusive, dated August 1, 1916. Maturity date, August 1, 1926.

Plaintiffs' Exhibit 3 in case No. 731; six bonds of Local Improvement District No. 8, American Falls, Idaho; $500 each, and numbered 38 to 43, inclusive, dated September 1, 1916; maturity date September 1, 1926.

Plaintiffs' Exhibit 4, in case No. 743; fourteen bonds of Local Improvement District No. 9, American Falls, Idaho; $500 each, numbered 38 to 51, inclusive, and dated September 1, 1916; maturity date September 1, 1926.

Plaintiffs' Exhibit 4 in case No. 731; newspaper clipping of printed ordinances 55, 64, 65, 66, 68 and 69 of the Village of American Falls, pertaining to Local Sewerage Improvement District No. 1, American Falls, Idaho.

Plaintiffs' Exhibit 5 in case No. 731; newspaper clippings of printed ordinances Nos. 68, 74, 79 and 83 of the Village of American Falls, Idaho, pertaining to Local Sewerage Improvement District No. 2, American Falls, Idaho.

Plaintiffs' Exhibit 6 in case 731; newspaper clippings of printed ordinances Nos. 75, 80, and 84 of the Village of American Falls, Idaho, pertaining to Local Improvement District No. 8, American Falls, Idaho.

Plaintiffs' Exhibit 7 in case No. 743; newspaper clippings of printed ordinances Nos. 70, 76, 81 and 85 of the Village of American Falls, Idaho, pertaining to Local Improvement [fol. 143] District No. 9, American Falls, Idaho.

Plaintiffs' Exhibit 8 in cases No. 731 and 743; copy of report of Auditor Willard S. Bowen, upon audit of funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering a period from the opening of accounts to February 28, 1923.

Plaintiffs' Exhibit 9 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audits of general funds of the Village of American Falls from January 1, 1916 to October 31, 1926, and of the funds of Improvement Districts 1, 2, 8 and 9 covering a period from March 1, 1923 to October 31, 1926; report dated December 18, 1926.

Plaintiff's Exhibit 10 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds and funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering period from October 31, 1926 to May 3, 1927; report dated June 6, 1927.

Plaintiffs' Exhibit 11 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of funds of Improvement Districts Nos. 1, 2, 8 and 9, American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 12 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds of City of American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 13 in cases Nos. 731 and 743; photo- [fol. 144] static copy of the original assessment roll of the village of American Falls, covering assessments levied and extended for a ten-year period, upon each lot or parcel of land within Improvement Districts 1, 2, 8 and 9, American Falls, Idaho.

Plaintiffs' Exhibit 14 in case No. 731 and Exhibit 3 in case No. 743; being a computation by Willard S. Bowen of the amounts due upon bonds (Plaintiffs' exhibits 1 to 4, inclusive) of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, computed to November 1, 1931.

Plaintiffs' Exhibit 16 in cases Nos. 731 and 743; newspaper clippings of printed ordinances 122 to 125, inclusive of the city of American Falls, pertaining to reassessments in Improvement Districts Nos. 1, 2, 8 and 9, respectively, American Falls, Idaho; dated July 3, 1928.

Plaintiffs' Exhibit 1 in case No. 743; a compilation by T. C. Sparks of lots within Local Improvement District No. 9, American Falls, Idaho, acquired by the defendant for reservoir right of way purposes, with amount set after each lot of the amount of a purported reassessment under city ordinance 125 (Plaintiffs' Exhibit 16).

Defendant's Exhibit 1; being copy of land purchase contract of date of December 9, 1925, between the United States of America and C. F. Dahlen, for the purchase of Lot 7 of Block 64 of Riverside Addition to American Falls, for a consideration of $2,425.00.

[fol. 145] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

UNITED STATES OF AMERICA,
District of Idaho, ss:

I, Charles C. Cavanah, U. S. District Judge for the District of Idaho and the Judge before whom the within entitled action was tried, to-wit, the cause entitled The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, plaintiff, vs. The United States of America, defendant, which is case No. 731, in said District Court, do hereby certify that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein, and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein save and except plaintiff's exhibits 1 to 6, inclusive; 8 to 14, inclusive, and 16, and defendant's Exhibit 1, the original of which the clerk is hereby ordered to transmit to the Appellate Court with the transcript of record and as a part thereof.

I further certify that the above and foregoing bill of exceptions was duly and regularly filed with the clerk of said court and thereafter duly and regularly served within the [fol. 146] time authorized by law and that no amendments were proposed thereto excepting such as are embodied therein;

I further certify that due and regular notice of time and place for settlement and certifying said bill of exceptions was given.

Dated at Boise, Idaho, this 12th day of May, 1932.

Charles C. Cavanah, District Judge.

IN UNITED STATES DISTRICT COURT

EXCEPTIONS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Feb. 22, 1932

Comes now here the United States of America by its counsel and excepts to the Special Findings of Fact and

Conclusions of Law found, made and filed by the court on the 23rd day of January, 1932, for the reasons following:

That the facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment; the court received and admitted incompetent, irrelevant, immaterial and hearsay evidence over the objections of the defendant in support of the findings of fact. The court refused to receive and admit competent, relevant and material [fol. 147] evidence offered on behalf of the defendant, which should have been the basis of the court's finding of fact. There was no substantial evidence to sustain a finding in favor of the plaintiff and against the defendant.

There is no evidence to support finding number 4 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 7 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 11 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 15 and said finding is contrary to the evidence.

There is no evidence to support finding number 17 and said finding is contrary to the evidence.

There is no evidence to support finding number 18 and said finding is contrary to the evidence.

There is no evidence to support finding number 19 and said finding is contrary to the evidence.

There is no evidence to support finding number 20 and said finding is contrary to the evidence.

There is no evidence to support finding number 21 and said finding is contrary to the evidence.

There is no evidence to support finding number 22 and said finding is contrary to the evidence.

[fol. 148] There is no evidence to support finding number 23 and said finding is contrary to the evidence.

There is no evidence to support finding number 24 and said finding is contrary to the evidence.

There is no evidence to support finding number 25 and said finding is contrary to the evidence.

That the defendant excepts to the first conclusion of law of the court for the reason that the same is not supported by the facts found by the court, or by the evidence and is contrary to law.

That the defendant excepts to the second conclusion of law of the court for the reason that the same is based upon insufficient findings of fact, and is not supported by the law.

Defendant excepts to the third conclusion of law of the court for the reason that the same is not based upon the facts found by the court, and is contrary to the law.

Defendant excepts to the fourth conclusion of law of the court for the reason that the same is not based upon the facts found by the court, and is contrary to the law.

Defendant excepts to the fifth conclusion of law of the court for the reason that the same is not based upon the facts found by the court, and is contrary to the law.

Defendant excepts to the failure of the court to conclude [fol. 149] as a matter of law in favor of the defendant, and against the plaintiff.

H. E. Ray, B. E. Stoutemyer, Attorneys for Defendant.

Exceptions noted and allowed this 22 day of February, 1932.

Charles C. Cavanah, District Judge.

In United States District Court

Defendant's Motion to Correct Findings of Fact to Conform to the Evidence Filed Feb. 13, 1932

Comes now the defendant and respectfully shows to the court that the written transcript of the evidence in the above entitled cause is now available, and that such transcript shows beyond question that many of the findings of fact heretofore signed by the court are entirely without evidence to support them and are directly in conflict with the evidence, wherefore defendant moves the court to correct the findings of fact heretofore filed in the following particulars to conform to the evidence:

[fol. 150] 1. Defendant moves the court to strike out of Finding No. 19 the words

"on the 1st day of January, 1927",

and the words:

"without any proceedings in eminent domain against the plaintiff or its predecessor in interest J. K. Mullen,"

and the words:

"the defendant being aware and advised that the bonds held by this plaintiff and the interest thereon were outstanding, due, and unpaid, and being aware that the assessments levied against said property were insufficient to pay outstanding bonds so held by the plaintiff,"

and the words:

"sold, destroyed, or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts,"

and the words:

"and thereby deprived the plaintiff of its property and totally destroyed plaintiff's property, and deprived it of its statutory remedy and proceeding for the collection of its bonds,"

and the words:

"and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and the collection of the bonds aforesaid,"

[fol. 151] and the words:

"and that the property so taken by flooding, as aforesaid, by the defendant was at the time of the taking of a value greatly in excess of the claim of the plaintiff,"

and the words:

"that the bonds aforesaid held and owned by the plaintiff before and at the time of the taking of the property were and are worth their respective face value, together with accrued unpaid interest,"

on the ground that there is no evidence whatever to support the finding that the property so taken by flooding was at the time of the taking of a value greatly in excess of the claim of the plaintiff, and no evidence of any kind whatever as to the value of the property or any part thereof,

and that there is no evidence that the taking of the land and the flooding thereof or the removal of the improvements occurred on the 1st day of January, 1927, but that all the evidence is to the contrary; that there is evidence showing that part of the property was acquired by condemnation but no evidence whatever as to who were the defendants in the condemnation suits and no evidence whatever to support the finding that the taking of the property was without any proceeding in eminent domain; that there is no evidence whatever to support the finding that the de-[fol. 152] fendant sold or destroyed or removed all improvements located on the lots and parcels within said sewerage and improvement districts on January 1, 1927, or at any other time, or at all, the evidence as to the removal of the improvements being the evidence of the plaintiff's witness T. C. Sparks, who testified that he was a lot owner in the area flooded by the reservoir and was the mayor of the town and that he himself removed his own improvements in April, 1925; that Mr. Sparks' testimony, which is the only testimony in the record as to who removed any of the buildings, or as to the time when the removal of buildings and improvements occurred, is as follows, reduced to narrative form:

"It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2 and 8, I would say were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during storage. One of the last buildings moved off of the old townsite, as I recall, was the Grand Hotel. I cannot fix the date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925*, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance [fol. 153] of the buildings";

that it was a common practice for the lot owners to reserve the right to their buildings and other improvements and to remove such buildings themselves, and that it appears that is what was done in Mr. Sparks' case and his is the

sole testimony as to who moved any of the buildings and improvements; that defendant therefore moves the court to substitute, in lieu of the portion of finding 19 herein moved to be stricken out, a finding as follows:

"That during the year 1925, and prior thereto, the buildings and improvements were removed from the lots in the reservoir site; that the plaintiff's witness T. A. Sparks, one of the lot owners, testified that he moved his house off in April, 1925; and that there was no testimony as to who moved any of the other houses or improvements."

2

Defendant further moves the court to strike from findings No. 7, 11, and 15 the words:

"upon the issuance of said bonds and before maturity thereof, the said J. K. Mullen purchased and acquired all of said bonds, paying therefor the full face value therefor; that thereafter and in 1925 the said J. K. Mullen gave, transferred, and set over to the plaintiff, the John K. and Catherine S. Mullen Benevolent Corporation, a corpora-
[fol. 154] tion, the bonds aforesaid,"

on the ground that there is no evidence to support the above quoted findings.

3

Defendant further moves the court to strike out all of finding No. 20 and to strike out of finding No. 23 that part thereof reading:

"that no money collected for the payment of said bonds was lost through the delay and neglect of the city officials to apply promptly the moneys collected from the lot owners for the retirement of the bonds,"

and also to strike out that part of finding No. 23 reading:

"that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking recognized the rights of the plaintiff and withheld from the private individuals owning said prop-

erty an amount of money sufficient to discharge the claim of the plaintiff,"

for the reason that the said finding No. 20 and the said above quoted portions of findings No. 23 are not supported [fol. 155] by the evidence but are contrary to the evidence; and the defendant moves the court to substitute in lieu of said finding No. 20 and the said above quoted portions of finding No. 23 the following:

"That at the time the United States, acting through the officer of the United States Reclamation Bureau in charge of the construction and operation of said reservoir, F. A. Banks, took possession of the said property in the said improvement districts in the American Falls reservoir site, and flooded the same as a portion of the said American Falls reservoir, the said officer of the United States in charge of said work claimed the title to said premises was in the United States by reason of the previous purchase and condemnation thereof by the United States and the conveyance of said property to the United States prior to said flooding, and did not recognize the plaintiff herein, or the bondholders, as the owner of said premises, or any part or interest therein; that in connection with some of the lot purchases, a portion of the purchase price was temporarily suspended pending an opinion as to whether or not there could be any valid lien on the property in the event of an attempted reassessment after conveyance to the United States, and upon receipt of legal opinion by the legal advisers of the government that there could be no such valid lien, the amount of money temporarily suspended was paid over to the lot owners by the United States pursuant to the terms of the contracts."

[fol. 156] This motion is made upon the records and files in this case and the evidence as submitted to the court.

The defendant further requests that in the event the foregoing motion, or any part thereof, is overruled by the court, that defendant's exception thereto be noted.

H. E. Ray, B. E. Stoutemyer, Attorneys for the Defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR APPEAL—Filed Mar. 21, 1932

Comes now the above-named defendant, the United States of America, and enters its appeal from the final judgment of this court made and filed in the above cause on the 28th day of January, 1932, to the United States Circuit Court of Appeals, for the Ninth Court, returnable before said court at San Francisco, in the State of California.

The said plaintiff, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, and W. G. Bissell, its attorney of record, will take notice of said appeal.

H. E. Ray, United States Attorney for the District of Iowa, Attorney for Defendant, Appellant.

[fol. 157] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Mar. 21, 1932

To the Honorable Charles C. Cavanah, District Judge:

Comes now the above-named defendant, United States of America, and says that on or about the 28th day of January, A. D. 1932, this court entered judgment against said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the Assignments of Error, which is filed with this petition.

And petitioner further says that said cause was brought against said defendant under Title 28, Section 41, U. S. C. A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

Wherefore the said defendnat prays that an appeal be allowed in its behalf in the United States Circuit Court of [fol. 158] Appeals for the Ninth Circuit of the United

States for the correction of the errors so complained of; that said allowance operate as a supercedeas and no bond ~~therefor or for~~ costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

H. E. Ray, United States Attorney for the District of Idaho.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 21, 1932

Upon the petition for appeal, accompanied by Assignments of Error, heretofore filed herein, it being made to appear that said petition should be allowed and that appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice,

It is ordered that said petition for appeal be and hereby is granted and an appeal allowed, and the same shall operate as a supersedeas and no supersedeas, cost, or other bond on appeal shall be required.

[fol. 159] Dated this 21st day of March, A. D. 1932.

Charles C. Cavanah, District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Mar. 21, 1932

The defendant assigns errors in rulings of the court in the above entitled cause as follows:

Assignment No. 1

That the court erred in holding that the court had jurisdiction of this action and jurisdiction to render judgment against the United States herein:

1-a. In that there is no contract, express or implied, between the United States and the plaintiff herein and that the cause of action, if any, arises in tort.

1-b. In that the action of the United States complained of as having defeated plaintiff's alleged sole remedy of reassessment, namely, the action of the United States in acquiring title by purchase or condemnation to all lands in the reservoir site including those in the special improvement districts which removed the property from the taxing or assessing power of the city and state, is shown to have occurred in most cases more than six years prior to filing [fol. 160] of this action and that plaintiff wholly failed to show what, if any, of the lots were condemned, purchased or conveyed to the United States within six years of the date of the filing of this action.

1-c. In that the loss or damage, if any, suffered by the plaintiff was of a remote, indirect, and consequential nature of a class for which congress has given the court no jurisdiction to award judgment against the United States.

1-d. In that this is an action which under the state law could not be maintained against a private lot owner, the private lot owner not being personally liable for special improvement assessments against his property, even when such assessments are valid and unpaid, the remedy being against each lot separately for its assessed portion of the cost without any authority for a personal judgment against the lot owner, and that congress has not under any condition subjected the United States to any greater liability or different form of action from that to which the private citizen or lot owner would be liable.

1-e. That the officer of the United States in charge of the construction and operation of the reservoir at the time that he took possession of the land in the reservoir site and at the time that he flooded the land with the waters of the reservoir and applied the land to use for reservoir purposes did so under a claim of title in the United States by reason of the previous purchase and condemnation of the property and did not recognize plaintiff as the owner thereof or of any interest therein.

[fol. 161] Assignment of Error No. 2

That the court erred in overruling defendant's demurrer to plaintiff's second amended complaint and erred in over-

ruling each of the several grounds of demurrer set out therein.

Assignment of Error No. 3

That the court erred in overruling defendant's motion to strike and defendant's motion to make plaintiff's second amended complaint more definite and certain.

Assignment of Error No. 4

That the court erred in his findings of fact herein, in that the said findings of fact are not supported by the evidence but are contrary to the evidence, and in including in said findings of fact numerous statements which are conclusions of law and are incorrect statements of the law.

Assignment of Error No. 5

That the court erred in rendering judgment against the United States in an amount measured by the unpaid balance of the bonds and interest thereon, and that such is not the proper measure of damages, and that the United States, if liable at all, could only be held liable for such part, if any, of the loss as is shown to have been caused by the United States. That many causes of loss for which the United States was in no way responsible are shown to have [fol. 162] contributed to the default in the payment of the bonds, and that the undisputed evidence of plaintiff's own witnesses shows that the action of the United States in purchasing and condemning the real property in question not only did not cause any loss to the bondholders but, to the contrary, was distinctly beneficial to the bondholders and resulted in the payment of a larger percentage of the bonds than would otherwise have been paid, and that for that reason there was a much smaller percentage of defaulted bonds in the districts where the United States purchased or condemned all the property than in the district where the United States took only a small percentage of the property.

Assignment of Error No. 6

That the court erred in finding, concluding and holding, in his findings of fact, finding No. 18 and inserting the various allegations therein contained, in that each and every

allegation contained in said finding No. 18 is purely a conclusion of law and that each and every statement therein contained is an erroneous one, particularly the legal conclusion that the entire bond issue is a lien on each and every lot in the district notwithstanding the fact elsewhere established by the evidence found by the court (finding No. 22) that the original assessment for the payment of the bonds was paid in full by the United States and the admission that the attempted reassessment was void and of no effect.

[fol. 163]

Assignment of Error No. 7

That the court erred in holding that the plaintiff may recover from the United States for an alleged loss claimed to have resulted from a taking by the United States of real property on which the plaintiff as a bondholder claims a lien, where the plaintiff acquired the bonds, if at all, after the United States had taken the real property in question, and the plaintiff has failed to show that it owned any bonds or property of any kind at the time of the taking which is claimed to have caused the loss or damage.

Assignment of Error No. 8

That the court erred in rendering judgment against the United States in the amount named in the judgment herein, or in any amount.

Assignment of Error No. 9

That the court erred in that part of its finding No. 22, reading

"That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, *but only paid the amount shown upon the original assessment*."

in that the finding that the United States paid the original assessment, which was the only assessment ever made except the admittedly void reassessment attempted several [fol. 164] years after the United States had acquired title to the property, renders the statement that

"the defendant did not pay or cause to be paid all the liens against said improvement districts,"

either an immaterial reference to liens held by third parties and in which the plaintiff had no interest, or an erroneous conclusion of law intended to imply that the bonds themselves are still a lien after the full payment of the assessment.

Assignment of Error No. 10

That the court erred in finding that the plaintiff owned or acquired any bonds at any time prior to 1928, or at all, and erred in admitting, over defendant's objections, the incompetent hearsay testimony of the witness Chester Green (who was the only witness who testified concerning the ownership of the bonds) in view of the repeated statement of the witness that all he knew concerning the ownership of the bonds was what Mr. Mullen or someone else told him.

Assignment of Error No. 11

That the court erred in overruling defendant's motion for a non suit herein.

Assignment of Error No. 12

That the court erred in each and every conclusion of law filed herein, both as to the conclusions of law which are filed [fol. 165] as conclusions of law and the conclusions of law which are filed as findings of fact herein.

Assignment of Error No. 13

That the court erred in the court's conclusion of law No. 1 in that even if the same were a correct statement of the law, it does not support the judgment but is in conflict with the judgment, and that the court has entered judgment contrary to and in conflict with the legal principle announced in conclusion No. 1, in that said conclusion No. 1 holds the liability of the United States to be for

"all damages suffered by any and all persons having unpaid liens upon the real estate within said districts up to an amount not exceeding the reasonable value of the property taken by it,"

and that no evidence whatever has been offered as to the value of the property or of any lot, block or parcel thereof. That it has been found (finding No. 22) that the United States paid in full the original assessment, which was the only valid assessment ever levied and therefore the only lien and the only assessment ever attempted other than the admittedly void reassessment attempted to be levied years after the United States had acquired title to the property. That there being no unpaid lien, the judgment is in conflict with conclusion of law No. 1.

[fol. 166] Assignment of Error No. 14

That the court erred in that conclusion of law No. 1 is erroneous in holding that the United States contracted "impliedly," or at all, and in holding that the United States impliedly contracted "to pay *all damages suffered*," in that if the United States were liable at all, under no theory of law can it be held liable for any damage other than that shown to have been caused by it, which was no damage at all, as the evidence shows that the action of the United States was on the whole beneficial to the bondholders and resulted in the payment of a larger proportion of the bonds than would otherwise have been paid.

Assignment of Error No. 15

That the court erred in its conclusions of law No. 2 and No. 5, in that if the United States were liable at all, said conclusions No. 2 and No. 5 do not state the proper measure of damages.

Assignment of Error No. 16

That the court erred in holding that this action is not barred by the statute of limitations.

Assignment of Error No. 17

That the court erred in holding in effect that the facts as set out in that part of findings No. 5, 9 and 13, reading,

"that the levies and assessments so made through mistake or inadvertence were not in fact sufficient to pay *the principal and interest on the bonds* as the same became due [fol. 167] and payable"

established a right to or remedy by reassessment under the state law, Section 4141, Idaho Compiled Statutes, which authorizes or permits reassessment only when

"for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay *the costs of sewerage improvement.*"

That therefore no facts have been alleged, proved or found by the court sufficient to authorize reassessment even against privately owned land. That therefore the court erred in holding that the United States, by purchasing or condemning the property, deprived the plaintiff of its sole remedy, or any remedy, which it would otherwise have had, even if under any condition the termination of the taxing power of the municipality or state by reason of the conveyance of property to the United States could give rise to a right of action against the United States for the amount of the tax or assessment which might have been levied against the property had it remained in private ownership.

Assignment of Error No. 18

That the court erred in rendering judgment for an amount based upon and determined by the unpaid balance of the bonds and interest thereon, in that the lien of the assessments for the payment of special improvement bonds, which [fol. 168] assessments the court has found have been paid in full (finding No. 22), even if the assessments had not been paid would be only a secondary lien subject to a first and superior lien for state and county taxes, and that part of the property was shown to have been sold for taxes prior to purchase or condemnation by the United States and there was no evidence and is no finding as to the extent to which the secondary lien, if any, of the assessment for bond payment was extinguished by tax sale in enforcement of the superior lien of the state and county taxes.

Assignment of Error No. 19

That the court erred in that the maximum amount for which the United States could be held liable under any condition on account of the taking of any lot or tract of land for a public purpose (even if it had not already paid the

full value including all valid assessments and liens of record) would be the reasonable market value of the land, and that no evidence whatever has been offered herein as to the value of the real property taken by the United States or any part thereof, or as to whether the value thereof did or did not equal the amount of the bonds.

Assignment of Error No. 20

That the court erred in finding (finding No. 19) that the United States in acquiring title to the real property in question took the same

[fol. 169] "without any proceedings in eminent domain against the plaintiff and its predecessor in interest J. K. Mullen,"

and in finding (finding No. 25)

"That the defendant acquired all of the property within the limits of districts 1, 2 and 8 for reservoir purposes only, in some instances by condemnation proceedings, to which the plaintiff or its predecessor in interest was not made a party,"

in that there was no evidence as to who were the defendants in the condemnation cases or whether the plaintiff or its predecessor J. K. Mullen was or was not a party defendant therein, and that the court erred in rendering judgment against the United States under said above-quoted findings on the erroneous theory of law necessarily implied and derived from said findings and the judgment of the court thereunder, namely, the erroneous conclusion of law that it is necessary in order to secure clear title to a town lot for any public purpose and under pain of being held personally liable for the entire bond issue to join as parties defendant each and every holder of every municipal improvement bond even though, as in the present case, the bonds are payable to bearer and pass from hand to hand without any record of ownership anywhere, and even when, as in the case at bar, the assessment levied for the payment [fol. 170] of such bonds has been paid in full and every lien of record removed from the property.

Assignment of Error No. 21

That the court erred in its finding No. 19 in finding that the United States took and flooded the property in the

said improvement districts for reservoir purposes on January 1, 1927, in that there is no evidence to support such finding and that the same is in conflict with the evidence, and that the court erred in holding and finding that the United States on January 1, 1927, or at any other time, "sold, destroyed or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts", in that there is no evidence to support said finding and that the same is contrary to the evidence, the only evidence as to who removed the improvements being that of plaintiff's witness Sparks, who testified that he removed his own house in April, 1925, the sole testimony on this question (that of T. C. Sparks) reduced to narrative form being as follows:

"It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2 and 8, I would say were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during stor- [fol. 171] age. One of the last buildings moved off of the old townsite, as I recall, was the Grand Hotel. I cannot fix the date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925,* and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings."

Assignment of Error No. 22

22-a. That the court erred in receiving and admitting over the objection of the defendant the testimony of Chester Green as follows:

I am a district manager of the Inter-Ocean Elevators, which is owned and controlled by the Mullen interests, and I live in Salt Lake City, Utah. I remember the incident of the Village of American Falls issuing certain improvement district bonds in 1915 and 1916, which bonds were purchased by Mr. J. K. Mullen at my suggestion.

"Q. Since the time of the purchase of those bonds have you been charged with the duty of looking after collecting the bonds?

Mr. Stoutemyer: I object to this line of testimony and move that the previous answer be stricken upon the ground his information is based upon oral statements as to who purchased the bonds, and is incompetent. If those bonds were purchased the record will show who purchased them. [fol. 172] It is not the best evidence.

The Court: Objection overruled."

22-b. And in admitting and receiving the testimony of Chester Green as follows:

I have been charged with the duty of looking after the collection of these bonds. I am acquainted with the J. K. and Catherine Mullen Benevolent Corporation which was organized in 1925.

"Q. At the time of his organization do you know what if any assets were transferred to the corporation by J. K. and Catherine Mullen?

Mr. Stoutemyer: I object to that as not the best evidence, and incompetent. The transfer was in writing, if there was one.

Mr. Bissell: These bonds were made payable to bearer.

Mr. Stoutemyer: I would like to ask a question in aid of the objection.

The Court: Yes.

Mr. Stoutemyer: Did you see any bonds transferred to Mr. Mullen or to this corporation?

A. I did not see them transferred, no.

Mr. Stoutemyer: We renew our objection to the question as incompetent, and not the best evidence.

The Court: What position do you hold in the Oneida Elevator Company?

A. I am the district manager, at Salt Lake City, Utah, at this time.

[fol. 173] The Court: It is doubtful if that is sufficent to show the transfer of the bonds, or that the bonds are an asset of the corporation."

I have seen the bonds (plaintiff's Exhibits Nos. 1, 2 and 3) before; they were delivered to me in person by Mr.

J. K. Mullen, in Gooding, Idaho. I know who the president of the J. K. and Catherine S. Mullen Benevolent Corporation was; it was Mr. Wetbaugh.

"Q. At the time the assets were delivered to you, as whose property were they delivered?

Mr. Stoutemyer: That is objected to upon the ground no foundation has been laid; no way he could know except by hearsay.

The Court: Objection overruled.

Mr. Bissell: Answer the question.

A. What was the question?

(Question read.)

A. There was a memorial endowed, and to aid that Mr. Mullen contributed several million dollars for its assets.

Mr. Stoutemyer: I move that the answer be stricken as incompetent, and immaterial, and not the best evidence.

The Court: Motion denied."

22-c. And in admitting and receiving the further testimony of Chester Green as follows:

"Q. And were the bonds you hold in your hand, exhibits 1 to 3, for the purpose of identification, delivered to you as the property of any corporation?

A. Yes, sir.

[fol. 174] Mr. Stoutemyer: That is objected to, and I would like to ask a question in aid of objection.

The Court: Yes.

Mr. Stoutemyer: When you say when you were asked whether these were delivered as the property of any corporation, did you have any knowledge as to whose property they were other than what somebody stated to you?

A. The party that purchased the bonds delivered them to me.

Mr. Stoutemyer: Answer the question. Are you basing your answer on what someone else said to you?

A. What somebody else said to me? Yes, sir.

Mr. Stoutemyer: That is hearsay and incompetent.

The Court: Objection sustained.

Q. Was the party who delivered these bonds to you the party who had organized the plaintiff company and who had contributed its entire capital stock of its organization?

Mr. Stoutemyer: We object to that. The records are the best evidence; also incompetent, irrelevant and immaterial. That is all based on hearsay.

Mr. Bissell: These are not bonds they are required to be transferred in writing. They are bearer bonds.

The Court: Were these bonds delivered to you by any one as to be the property of this corporation in question?

A. Yes, sir.

[fol. 175] The Court: Who delivered them to you?

A. Mr. Mullen.

The Court: What did you do with them?

A. I delivered them to Mr. Bissell here.

The Court: The company held them ever since the incorporation?

A. Yes, sir.

The Court: As the assets of the corporation?

A. Yes.

The Court: You know that to be a fact without someone telling you?

A. Yes, sir.

The Court: Objection overruled.

Mr. Stoutemyer: May an exception be allowed?

The Court: Yes."

22-d. And in further admitting and receiving the further testimony of Chester Green as follows:

"Do you know of your own knowledge when J. K. Mullen transferred the property to the J. K. and Catherine S. Mullen Benevolent Corporation?

A. At the time of its organization.

Mr. Stoutemyer: What property? We object to that as the property is not identified. What property do you mean?

Mr. Bissell: This property here.

Mr. Stoutemyer: Those bonds?

Mr. Bissell: Yes.

The Court: Objection overruled, if he knows.

[fol. 176] Q. And when were they so delivered?

Mr. Stoutemyer: We object to that on the ground that it is based upon hearsay evidence; if he knows. I will ask if he knows, not what someone told him.

The Court: Do you understand the question? Do you know, not what someone told you.

Q. (cont.). To the Benevolent corporation.

A. The president of the company told me that he did. I did not see them transferred. To answer Mr. Stoutemyer's question, I did not see the bonds actually delivered to him.

The Court: You know only what the president of the company told you?

A. Yes, sir.

The Court: Objection sustained."

Mr. Green continued to testify:

The bonds in question were delivered to you in person, Mr. Bissell, by myself and Mr. J. K. Mullen at Gooding, Idaho.

"Mr. Bissell: As whose property were the bonds delivered to me for collection by yourself and J. K. Mullen in Gooding, Idaho?

Mr. Stoutemyer: We object to that on the ground that the witness has already shown his knowledge is based upon hearsay, what someone told him.

The Court: The question is, whose property?

Mr. Bissell: Yes.

Mr. Bissell: May I make an observation, Your Honor? [fol. 177] The Court: Yes.

Mr. Bissell: If a certain bond payable to bearer is in the possession of the duly authorized representative of a company and is delivered to an attorney for collection in that capacity that is a prima facie showing of the ownership of the bond, is it not?

The Court: Yes.

Mr. Bissell: That is all I was trying to prove by this witness.

Mr. Stoutemyer: In the first place, the record does not show whether this man was a duly authorized officer of the corporation; and in the second place, if the corporation owned the binds some one else did not own them at all, as

shown by this witness, and his knowledge is derived from what someone else told him.

The Court: This transfer, he can show that this witness as the agent of the company delivered the bonds to you for collection?

Mr. Stouteмyer: Whether the company owned them or not is objectionable on the ground that his knowledge is what someone told him.

Mr. Bissell: What I am endeavoring to show is that these bonds were delivered to me for collection as the property of that company. The bonds, you will notice, are payable to bearer, and their possession is prima facie evidence of ownership.

The Court: This officer apparently is not a defendant. [fol. 178] Mr. Bissell: I am asking what J. K. Mullen did with these bonds.

The Court: I think you can show they were delivered by this gentleman, delivered to you. Whether they were the property of the corporation or not is another question. I think you can show what the transaction was. Objection overruled.

(Question read.)

A. The property of the John K. Mullen and Catherine S. Mullen Benevolent Corporation."

Assignment of Error No. 23

23-a. That the court erred in receiving and admitting in evidence auditor's reports of witness Willard E. Bowen over objection of the defendant as follows:

I have made four separate audits of the books of the city of American Falls in respect to the said improvement districts, one covering a period from 1915 to February 28, 1923; another from that time to October, 1926, which included an audit of the general fund from the time of the original audit of the improvement district funds; a third to May 3, 1927, and a fourth to May 5, 1931, which is in three sections, one of which covers the special improvement district funds and another the general funds. All of these audits are with reference to the funds of special improvement districts 1, 2, 8 and 9 of the City of American Falls (plaintiff's Exhibits 8, 9, 10, 11 and 12-) plaintiff's ex-

hibits are carbon copies of my reports to the City of Ameri [fol. 179] can Falls upon those audits, Exhibit 12 being a report of my general audit ending May 5, 1931.

"Mr. Stoutemyer: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the reassessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff having never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A reassessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data would only be material for that purpose. The original assessment—the reassessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of this data and all of these records [fol. 180] become immaterial except as to the payment on the original assessment, and that is not material because not alleged if was not paid, and no claim it was not paid.

The Court: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

Mr. Bissell: That is a report of audit, and the report of an auditor is always a conclusion.

The Court: I will reserve my final ruling on that question as to the admissibility of this evidence.

Mr. Bissell: Subject to that it will be admitted?

The Court: Yes, received subject to final ruling."

22 b. And in admitting additional auditor's reports of the said witness Bowen over defendant's objection as follows:

"Mr. Bissell: I now offer that in evidence, the second audit report.

Mr. Stoutemyer: We object to that on the grounds as stated in the former objection.

The Court: The same ruling and understanding, and it will be received at that time."

23 c. And in admitting and receiving in evidence the further auditor's report of said witness Bowen over defendants objection as follows:

[fol. 181] "Q. Handing you a paper which has been marked plaintiffs' Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?

A. Yes, that is a carbon copy of the original report that was handed to the officers of the City of American Falls.

Mr. Bissell: That is offered in evidence, dated June 6, 1927.

Mr. Stoutemyer: That is objected to on the grounds stated with reference to the previous offers.

The Court: Admitted with the same understanding and reservation of ruling."

23 d. And in admitting and receiving in evidence the further auditor's report of said witness over defendant's objection as follows:

"Mr. Bissell: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in case 731.

Mr. Stoutemyer: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed previous to that and cannot be used to support a claim for the recovery of compensation, which must be [fol. 182] based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

The Court: Overruled."

23 e. And in failing to strike out said auditor's reports (plaintiff's Exhibits 8, 9, 10 and 11) upon motion of the defendant as follows:

"Mr. Stoutemyer: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not applicable to the issues as presented by the pleadings and by the decision of this court an attempted reassessment is not valid.

The Court: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

23 f. And in admitting and receiving the testimony of Willard S. Bowen, wherein he testified as follows:

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

Mr. Stoutemyer: We object to that on the same grounds that were urged to the previous offers.

[fol. 183] The Court: Objection overruled. Admitted."

23 g. And in admitting and receiving the testimony of Willard S. Bowen wherein he testified as follows:

"Q. Did you make a similar calculation as to district No. 2?

A. I did.

Q. From your examination and calculation?

Mr. Stoutemyer: I make the same objection to this question.

The Court: Same ruling.

Q. Was it possible for you to determine solely as a mathematical proposition whether the original assessment made was sufficient to pay the interest and principal of the bonds as the same became due?

Mr. Ray: I make the special objection to that because it does not cover the estimated cost of construction.

The Court: Objection overruled.

Q. Answer the question.

A. It would be possible to show that on No. 2 as well."

23-h. And in admitting and receiving the testimony of Willard S. Bowen as follows:

"Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

Mr. Ray: That is immaterial, and not binding on the government, no matter what he said.

[fol. 184] Mr. Stoutemyer: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

The Court: If you make a connection showing this clerk's statements were binding I will allow it.

Mr. Bissell: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

The Court: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question."

Mr. Bohlson, a clerk in the office of Construction Engineer Banks, said that there was held in some sort of a fund approximately $13,000 for the purpose of paying the assessment that had not been paid on the land that has been purchased. Mr. Bohlson's statement included District No. 9 in case No. 743 of the J. K. Mullen Investment Company vs. United States.

23-i. That the court erred in sustaining an objection of the plaintiff to testimony of said Willard S. Bowen on cross-examination as follows:

"Q. In one of your reports, Mr. Bowen, you refer to a special deposit which you set up as a collection of a judgment against Sam Forter. Who was Sam Forter?

A. Sam Forter, as I understand it, was a contractor who let——

[fol. 185] Mr. Bissell: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that

being a cause of action for defective construction of sidewalks, in District No. 9. That is not material here.

The Court: Objection sustained, but not as to No. 9."

23-j. And in sustaining an objection of the plaintiff to the testimony of said Willard S. Bowen on cross-examination as follows:

"Q. To what extent could the default of the bonds in that district have been reduced had that collection been promptly applied to the reduction of the indebtedness of the sidewalk district instead of held in the special account and used for other purposes?

A. Well, I can best answer that by saying that at the time the First National Bank of American Falls closed, there was $438.75 in that account, and had that been paid at that time, or before that time——

Q. (Int.) My question is, how much would it have been reduced if the amount of this collection of Forter of $2915.00 been promptly applied to reduce the bonded indebtedness. That was the question.

Mr. Bissell: That is objected to as immaterial. The bonds are in evidence and only payable at a certain time.

The Court: Objection sustained to the form of the question."

[fol. 186] 23-k. And in sustaining an objection of the plaintiff to the testimony of said Willard S. Bowen on cross-examination as follows:

"Q. And then would you say from an examination of your books and the setup for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?

A. That was very largely responsible.

Q. That is practically responsible, is it not, which really caused this condition?

Mr. Bissell: We object to that as immaterial, calling for a conclusion, and hearsay.

The Court: Objection sustained as leading."

Assignment of Error No. 24

That the court erred in admitting and receiving into evidence the plaintiffs' Exhibit 16 over objection of the defendant, as follows:

"I am the city clerk of American Falls and in custody of the ordinance book of that city. I have here original ordinances Nos. 122 to 125 and also copies thereof.

(Whereupon the copies were offered as substitutes for the originals, and marked plaintiff's Exhibit 16.)

Mr. Bissell: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Press, which was the official newspaper of the City of American [fol. 187] Falls, which has each of the ordinances printed verbatim and in full.

Mr. Stoutemyer: We object to that on the ground it has not been shown that the United States acquired title and that the attempted reassessment was void and already discharged in this case, and therefore immaterial.

The Court: You do not object on the ground that they are not ordinances of the city, and passed by the city?

Mr. Stoutemyer: No.

The Court: Objection overruled."

Assignment of Error No. 25

25-a. That the court erred in sustaining the objection of the plaintiff of the testimony of F. A. Banks testifying on behalf of the defendant as follows:

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

Mr. Bissell: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

The Court: Objection sustained.

Mr. Stoutemyer: We offer to prove by this witness that at the time this property was taken by the government, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact [fol. 188] have such title, and this witness never recognized

the bondholders as the owner or having any interest in that property at the time it was taken for the government of the United States.

The Court: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or having any interest therein?

A. No, sir.

Mr. Bissell: I object to that and move to have the answer stricken. I object to it as immaterial.

The Court: Objection sustained."

25-b. That the court erred in sustaining the objection of the plaintiff to the testimony of F. A. Banks testifying on behalf of the defendant as follows:

"The money temporarily suspended was paid to the land owners.

Q. Was that after an opinion had been rendered that the reassessment was not a valid lien?

Mr. Bissell: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion.

The Court: Objection sustained."

[fol. 189] Assignment of Error No. 26

That the court erred in overruling and denying the defendant's motion to correct the court's findings of fact to conform to the evidence, and in failing to so correct its findings.

H. E. Ray, United States Attorney for the District of Idaho, Attorney for Defendant, Appellant. Residence: Boise, Idaho. B. E. Stoutemyer, Attorney for Defendant, Appellant. Residence: Portland, Oregon.

IN UNITED STATES DISTRICT COURT

WRIT ON APPEAL—Filed Mar. 21, 1932

The President of the United States to the Honorable Judge of the District Court for the District of Idaho, Eastern Division, Greetings:

Because in the records and proceedings, as also in the rendition of judgment, which in the said District Court before you between The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, plaintiff in said [fol. 190] court, and United States of America, defendant in said court, manifest error hath happened to the great damage of said appellant as by their complaint appears.

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, duly command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco in the State of California, within thirty days of this Writ, in the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witnesseth the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, this 21st day of March, A. D. 1932.

W. D. McReynolds, Clerk of the United States District Court, District of Idaho, Eastern Division.

Allowed by:

Charles C. Cavanah, District Judge.

[fol. 191] Citation, in usual form, filed March 21, 1932, omitted in printing.

[fol. 192] IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed March 21, 1932

To W. D. McReynolds, clerk of the above-entitled court:

Please prepare, certify, print, return and transmit to the Circuit Court of Appeals, Ninth Circuit, San Francisco, California:

1. Paragraphs 5, 9, 13 and 18 of Original Complaint—show filing date the Second Amended Complaint.
2. Answer of United States of America to Second Amended Complaint.
3. Minutes of the court showing motions made during the trial, denials of the same and exceptions thereto.
4. Findings of Fact and Conclusions of Law by the court.
5. Judgment.

[fol. 193] 6. Petition and Orders extending time for filing Bill of Exceptions by the court.

7. Bill of Exceptions.
8. Exceptions allowed by the Court to Findings of Fact and Conclusions of Law.
9. Motion of defendant for modification of Bill of Exceptions and Conclusions of Law, denial of the same, and exceptions.
10. Motion for Appeal.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Granting Appeal.
14. Writ on Appeal.
15. Citation on Appeal.
16. This Præcipe.

Omit printing title of the court and cause and verification.

H. E. Ray, United States Attorney for the District of Idaho.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PRÆCIPE—Filed March 25, 1932

To W. D. McReynolds, clerk of the above-entitled court:

[fol. 194] To the original Præcipe in this case, please add the following, having in mind the numbers in the original Præcipe:

3½. Demurrer of the defendant to the Second Amended Complaint. Order overruling same.

4½. Defendant's motion to strike portions of plaintiff's Second Amended Complaint, and Order overruling same.

5½. Defendant's motion to make plaintiff's Second Amended Complaint more definite and certain. Order overruling same.

Dated this 25th day of March, A. D. 1932.

H. E. Ray, U. S. Attorney for the District of Idaho.

IN UNITED STATES DISTRICT COURT.

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 195, inclusive, to be full, true and corrected copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of

Appeals for the Ninth Circuit, as requested by the Praecipes filed herein.

I further certify that the cost of the record herein amounts to the sum of $225.90 and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 10th day of June, 1932.

W. D. McREYNOLDS,
Clerk.

(Seal)

In the District Court of the United States in and for the District of Idaho, Eastern Division.

No. 731

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. 743

THE J. K. MULLEN INVESTMENT COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

January 13th, 1932.

W. G. BISSELL and BRANCH BIRD, Attorneys for the Plaintiffs.

H. E. RAY and B. E. STOUTEMYER, Attorneys for the Defendant.

CAVANAH, District Judge:

These two suits were instituted by the plaintiffs to recover from the United States the balance of principal and interest due on sewer and sidewalk

improvement bonds issued by the City of American Falls upon the theory that the United States under Acts of Congress took permanent and exclusive possession and title of all the real property within the local improvement districts to be used for a public reclamation storage reservoir. The only method of enforcing and collecting the bonds is by the levying and collecting of special assessments which are a lien on the property within the districts. Under the terms of the bonds and the statutes of the state the city has not obligated itself to pay the bonds, nor has the holder of them any claim against it for nonpayment as plaintiff's remedy is confined to the enforcement of the assessments levied against the property in the district. New First National Bank v. City of Weiser, 30 Ida. 15; 166 Pac. 213.

The principle applicable here is that where the United States appropriates to a public use private property which is admitted to be private property it may be held as upon an implied contract to pay its value. United States v. Great Falls Mfg. Co., 112 U. S. 645. And such is the case that where the United States has taken exclusive possession of private property, and if there exists a lien thereon for the payment of special improvement bonds and destroys the property so that the holders of the bonds could not realize on its bonds it becomes liable to the bondholders to the extent of the amount of the value of the property at the time of the taking of the property under the principle that an implied

contract arises to pay the amount of the liens to the extent of the value of the property.

Evidence was taken in each case and many questions are raised by the defendant, some of which were disposed of in the original opinion filed April 5, 1930, in Case No. 731, as to why it should not be required to pay the balance due on the bonds. In case No. 731 plaintiff seeks a recovery of $4000.00 as principal and interest on the sewer improvement bonds, and in case No. 743 a recovery is asked of $1514.23 principal and interest on the sidewalk improvement bonds.

In the original opinion it was held that the United States was liable for the property in the districts which was subject to the lien created by the statute under circumstances appearing in the complaint, under the principle that where it takes over for public purposes private property a contractual obligation is imposed by law on it to pay for the value of the property. The evidence clearly shows that the property in Improvement Districts Numbers 1, 2 and 8 upon which the statute gives the bondholders a lien for the payment of the bonds was taken over and flooded by the United States in the spring of 1927, and that there remained unpaid on the bonds after deducting credits due districts Numbers 1, 2 and 8 for loss of money, both principal and interest, in the failure of the bank, the sum of $8104.79.

As to Improvement District No. 9 only a portion of the lots were in the reservoir site and covered

by the structure of the dam. The proportion of the property taken in that district both as to assessment of benefits and proportion of the bonds after allowing all amounts to be credited, would leave the sum of $388.48 to be paid upon these bonds.

A further question is presented by the defendant, that the actions are barred by the statute of limitation. When considering this contention we are confronted with the principle that the statute of limitation does not begin to run until the defendant actually takes the property and not from the date of the deeds conveying it and that is true in these cases when we consider the provisions in the deeds from the property owners to the United States where it is provided that—"Vendor retains possession of all the buildings and improvements on the above described land, and agrees to remove the same to land outside of the American Falls Reservoir site by January 1, 1927." The complaints in these cases were filed, in case No. 731 in November, 1929, and in case No. 743 in July, 1930. So the period prescribed by the statute had not elapsed from the time of the taking and flooding of the property.

As to the ownership of the bonds they are made payable to "bearer" and the evidence shows that plaintiffs have possession of them and also became the owners thereof.

It is undisputed that the original assessments against the property were insufficient to pay the

principal and interest on the bonds as by their terms they became due. The city thereafter made a re assessment, but the taking of property by the defendant for the reservoir and flooding it with water deprived the city and the plaintiffs of their remedies at law and thereby made it impossible to enforce and realize upon the only security the bondholders had for the payment of the bonds. The law of the state provides that whenever the original assessment is insufficient to pay the costs for the improvement the city must reassess the property for an amount sufficient to pay them (4 C. S., Sec. 4024). The purchasers of these bonds had a right to assume that should it turn out for any reason that the original assessment would be insufficient to pay the bonds in full that the city had authority to reassess the property upon which a lien is given to make up any deficiency. The statute became one of the obligations of the bond.

Decree may be entered for plaintiffs in each case as follows: In case No. 731 for the sum of $8104.79, and in case No. 743 for $388.48.

United States of America,
District of Idaho. ss:

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of Memorandum Opinion in cases No. 731, The John K. and Catherine S. Mullen Benevolent Corporation vs. United States of America, and 743, the J. K. Mullen Investment Company vs. United States of America, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court in said District this 5th day of August, 1932.

[Seal] W. D. McREYNOLDS, Clerk,
By .....,
Deputy.

[Endorsed]: Filed January 13, 1932. W. D. McReynolds, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fifteenth day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION

ORDERED above causes argued by Messrs. Sam S. Griffin, Assistant United States Attorney, and Mr. Spencer L. Baird, counsel for appellant, and by Mr. W. G. Bissell, counsel for the appellees, and submitted to the court for consideration and decision, with leave to counsel for respective parties to file computations 10x10.

At a stated term, to wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-third day of January, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Before: WILBUR, SAWTELLE, and MACK, Circuit Judges.

WILBUR, Circuit Judge:

This action was brought under the provisions of the Tucker Act by the owners of certain bonds issued to cover the cost of sewers and disposal works and cement walks within certain assessment districts within the city (formerly village) of American Falls, Idaho. This action was consolidated on appeal with No. 6868 involving bonds of Improvement District No. 9. We will deal with the latter case in a separate opinion because of a difference in the pleadings but will include herein a statement of some of the facts applicable to Improvement District No. 9.

The land formerly occupied by the populated portion of the village of American Falls is now within the flooded area above the American Falls dam constructed by the United States across Snake River to empound waters for an irrigation project of the Reclamation Service. The people of the village

moved to higher ground above the submerged area and within the corporate limits of the village, taking with them the buildings which had been constructed upon their respective lots which they had reserved in selling their land to the United States.

The action is brought upon the theory that the United States Government appropriated the property of the appellants without compensation by reason of the inclusion within the flooded area above the American Falls dam of lands which were liable under the laws of Idaho for assessment for the payment of the improvements for which the bonds in question were issued. For Sewage Assessment District No. 1 bonds for $24,000 were issued. The bonds were of one thousand dollars each, bearing seven per cent per annum payable semi-annually. The principal of the bonds by their terms was payable "on or before July 15, 1925." The bonds also provided that

> "this bond is redeemable by said village on any interest payment date upon call of the treasurer of said village, made prior thereto by publication for thirty days in the official newspaper, following the delinquency of any installment of the assessment."

The bonds also contain a warranty

> "* * * that the total costs and expenses of said improvements have been duly levied and assessed as special assessments for sewerage improvements upon all of the lands, lots, and pieces and parcels of land in said local sewerage

> Improvement District No. 1, separately and in addition to all other taxes, and said special assessments are a lien upon said lands, lots, and pieces and parcels of land, and take precedence of all other liens; that due provision has been made for the collection of said special assessments and for the levy and collection of a direct annual tax, sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity."

The bonds further provide, in the language of the statute authorizing their issuance (Sub. 15, ch. 80, Session Laws of Idaho 1911) that

> "the holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued in any event, except for the collection of the special assessment made, for the work of improvement for which said bond was issued, but this remedy, in case of non-payment, shall be confined to the enforcement of such assessment."

The plaintiff alleges that assessments were duly levied and that

> "an assessment roll containing the names of the owners, description of the property in separate parcels, and the amount of the assessment thereon against said parcels of property was duly certified to and filed."

That later, by ordinance, the assessment roll was confirmed,

> "providing for the payment of such assessments in ten equal installments, with interest thereon at the rate of seven per cent per annum."

It is alleged that the ordinance (No. 69) providing for the issuance of the bonds,

> "prescribed the form and date of the bonds, the time of payment thereof, and provided for the levying and collection of special assessments which were then calculated as sufficient to pay the principal and interest of said bonds in accordance with their tenor and effects, but that the levies and assessments so made, through mistake or inadvertence, were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, according to their terms and provisions, or at all."

Plaintiff alleges that it purchased and owns four of said bonds of the par value of four thousand dollars upon which the interest has been paid to April 28, 1927, and that the principal is unpaid. Similarly the plaintiff alleges the formation of local Sewerage District No. 2, the issuance of bonds for $7150, fourteen bonds of the par value of $500 and one of $150, the purchase of four of said bonds by the plaintiff, that the interest thereon has been paid to October 25, 1929, and that $198.69 and no more has been paid on the principal. The complaint similarly alleges the issuance of bonds of

local Improvement District No. 8 for cement walks. There were forty-three bonds of $500 each payable on or before September 1, 1916, bearing seven per cent interest, of which plaintiff owns six bonds upon which the interest has been paid to March 18, 1928, but no part of the principal has been paid. It is alleged by plaintiff that owing to the insufficiency of the original assessment of benefits the city authorities by ordinances 122, 123 and 124 provided

> "for a re-assessment of benefits upon all taxable property in said Districts 1, 2 and 8, respectively, and directing the committee of streets, together with the city engineer, to make and file a re-assessment roll of the taxable real property within the boundaries of each of said districts, and providing for the re-assessing the cost thereof against all taxable real property within said three respective districts and providing for the payment thereof; that in accordance with the provisions of said three ordinances, re-assessment rolls were made out, certified to and filed by the proper village officials, and notices of the filing of said rolls were given in the manner provided by statute."

Plaintiff prays for a judgment for the unpaid amount of the principal of the bonds it owns, with interest from the dates above specified as the dates to which interest had been paid.

The foundation of the plaintiff's claim is that the lands within the several assessment districts involved were subjected to a lien for payment of

these bonds and that the appropriation of the lands by the United States has rendered it impossible to realize upon the lien and that therefore there is an implied obligation on the part of the United States to compensate for the property of the bondholder thus appropriated. At the outset it should be stated that the assessments of benefits made for the payment of the bonds prior to the time the lands were acquired by the Government, referred to in the bonds, were duly paid, either by the owners of the land who sold the property to the Government or from funds furnished by the Government to clear up the title at the time of the purchase. It should be noted here that although the bond on its face purports to be an agreement on the part of the village to pay a certain amount on or before a certain date with interest at seven per cent, the bond expressly states that the village is not under obligation to pay any part of this amount, nor is there an express or implied agreement by any property owner to pay any part of the amount. It is to be paid from certain assessment of benefits made liens on the several lots and parcels of land within the district and not otherwise. These assessments are spread over a period of ten years, payable in equal annual installments with interest (simple) on the deferred payments to be enforced when delinquent by foreclosure. The bondholder is relegated to a fund derived from the collection of these assessments so levied to pay his bond and in effect agrees that the amounts so realized limits his right of re-

covery. (See Bosworth vs. Anderson, 47 Id. 497; Moore vs. City of Nampa, 276 U. S. 536. Reassessments, when authorized, are made for the purpose of correcting errors in fact and in law (§§4024, 4141, I. C. S.) and not errors in judgment in the previous or original assessment (§4024 I. C. S.; see Lucas vs. Nampa, 41 Id. 35, 238 Pac. 288). It is claimed, however, that although the assessments levied against the lands in the district had all been paid, the land was nevertheless subject to a contingent liability for a special reassessment under the provisions of §4024 (see to same effect as to sewers, §4141 I. C. S.) of the Idaho Compiled Statutes, 1909, as follows:

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful, and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy."

The supplementary reassessments made by the city council of the city of American Falls in the year 1930 were made long after the Government

had purchased and taken possession of the lands within the several assessment districts here involved. It is contended by the appellee that these assessments are void and that its rights are and must be predicated upon the confiscation of its property by the United States in lieu of the methods of enforcement of the liens of the special assessments provided for by the statute of Idaho. We will not at the present moment consider whether or not such position is well taken if the bonds as distinguished from the assessments are a lien but will first examine the foundation of the appellee's right, namely, the question as to whether or not the bonds are a lien upon all or any of the property in the district.

The trial judge ruled in favor of the appellee upon the general propositions involved and rendered judgment for the plaintiff but deducted from the total amount claimed certain payments to the city of American Falls which in its opinion should have been applied upon the bonds to reduce the amount due thereon. The general scheme for street improvements and the construction of sewers under the Idaho statutes relied upon by the plaintiff provided for a resolution of intention on the part of the legislative authority of the city declaring its intention to go forward with the work and for the formation of a district with the boundaries to be defined in the resolution of intention to be subjected to assessment for the work; for the levy of an assessment upon the several pieces of property within the district to pay the cost of the work in propor-

tion to the benefits derived by the respective lots and in accordance with their frontage in the district; for an opportunity to appeal from the assessment roll made out by the city engineer or other proper authority of such municipality (§4008 I. C. S.) to the legislative body of the city (§4010 I. C. S.), and in the event of an adverse decision by such body to the District Court of the state and county (§4011 I. C. S.), and from that Court to the Supreme Court (§4012 I. C. S.). According to the statute the District Court can redetermine the amount of assessment upon the property of those property owners who take the appeal, in accordance with the principles stated in the statute. In the event that the cost of the improvement is such as to make it desirable that the cost of improvement should be collected in installments the statute provides for the issuance of bonds to cover the cost of the improvement to bear interest at a rate not to exceed seven per cent, and for the spreading of the payment of the principal over a period not to exceed ten years in equal annual installments, as determined by the legislative body of the city.

It is apparently contemplated that in the event of the issuance of bonds an assessment roll shall nevertheless be made up at the outset covering the full amount of the cost of the improvement and interest, as was done in this case (First Nat'l Bk. vs. City of Weiser, 30 Id. 14, 21). The annual installment of the principal of each separate assessment is to be extended upon the tax roll each year

in amounts sufficient to pay the annual installment or percentage of the entire bond issue for that year plus the interest to accrue upon the bonds due in the succeeding year. The bonds are not declared to be a general lien upon all the property within the improvement district. On the contrary, each separate piece of property in the district is subject to a lien for its own assessment and is not made liable for the assessment upon any other piece of property or for amounts in default because of the nonpayment of liens upon other pieces of property. (First Nat'l Bk. vs. Weiser, supra.)

Section 4007, Idaho Compiled Statutes, 1919, declares that when the assessment is made it shall constitute a lien upon the property, as follows:

> "Whenever any expense or cost of work shall have been assessed upon any land the amount of said expenses shall become a lien upon said lands which shall take precedence of all other liens and which may be foreclosed in accordance with the provisions of the code of civil procedure."

It is also provided in Section 4007 that in case suit is brought to enforce the lien that

> "where the court trying the same shall be satisfied that the work has been done, or material furnished, which, according to the true intent of this article, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted or a

charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or lots notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers."

No provision of the statute has been called to our attention, nor have we found one which specifically provides that the bonds shall be a lien upon the property within the assessment district. Indeed, such a declaration would be wholly inconsistent with the theory upon which the assessments for the cost and improvement are spread upon the assessment roll of the city and later extended on the tax rolls of the county, that theory being that each separate lot and parcel of land is liable for its proportion of the cost of the improvement and for no other portion thereof, and that the portion due from each lot must be ascertained in the first instance by the proper city authorities and in the case of appeal by the District or Supreme Court, as the case may be, and that when the amount is thus fixed that amount, and that amount only, constitutes a lien upon the particular lot which can be and is discharged by the payment of that amount by the owner of the property or by foreclosure (§4019 I. C. S., 1919). This is clearly laid down by the Supreme Court of Idaho in the case of New First Nat'l Bk. vs. Weiser, 30 Id. 15, 21, supra, from which we quote as follows:

"And it is provided that if any of the property owners pay their special assessments, they are entitled to be credited on their accounts as shown by the roll, both for interest and principal, and the roll should show such payments. The amounts having been thus charged to each piece of abutting property and paid by each property owner for the purpose of paying off his liability under such assessments, both principal and interest, the city authorities would have no authority under said act to divert the money so paid by the property owner to the payment of interest or principal due from abutting property owners who failed or neglected to pay their assessments as required by law. We do not think the city treasurer, under said act, would have the authority to divert the funds thus collected to the payment of the interest due from a delinquent. When a property owner pays his assessment as provided by said act and the city ordinance, the money arising therefrom is apportioned to the improvement district fund and from that fund the money is paid over to the holders of the bond for the purpose of paying interest on unpaid instalments, and the payment of the matured bonds themselves as far as the money collected will go. Neither the statute nor the ordinance of the city authorizes any other method of distributing the funds than was used by the city treasurer.

"The benefit assessed to each lot or parcel of ground abutting on such improvement is made liable for the payment of such assessment, and if the city shall fail, neglect or refuse to pay such bonds, or promptly collect any such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest thereon, five per centum, together with the costs of such suit, including a reasonable sum for attorneys' fees. (Sess. Laws 1911, p. 274.) * * *

"The bondholder can have no claim against the city on account of the debt created by the bond, and the bondholder is given no right as against a taxpayer who has paid all of his assessments. Such taxpayer has cleared himself from all liability on account of the bond issue, or in proportion to the time he has paid; that is to say, if he has paid up his assessments for three years, he has discharged that proportional part of his share of the bonded indebtedness, and the city authorities would have no right to divert any portion of the principal and interest paid by such taxpayer to the payment of the interest and principal on such bonds owed by a delinquent taxpayer."

We therefore agree with the appellee's statement of the law as follows:

"It should be remembered that these bonds are but the evidence of the obligation created by the assessment; the only lien is that created by the assessments and the bonds are only issued to permit payments to be made in installments over a period of years. Balaam vs. Pacific States S. & L. Co., 15 Pac. (2d) Cal. 186."

That an assessment had been made for the full cost of the improvement involved herein, and that such amount was equal to the par value of the bonds issued to pay the cost thereof, is conceded. It is contended, however, that the assessments to pay interest on the bonds were inadequate by reason of the failure to include any interest in the first annual assessment and by reason of the fact that the principal of the bonds was so divided that moneys paid in upon said assessment could not be immediately applied to the payment of bonds, and also by reason of its failure of the city and county authorities to apply moneys paid in by the property holders upon their assessments to the payment of bonds when available therefor. Furthermore, by reason of failure to include in the assessments the cost of collection charged by the county officials and fixed by statute amounting to 1½ per cent, the assessments levied were inadequate to pay the bonds and interest. One reason for the failure to apply the payments received from the property holder upon the bonds issued for the improvements was that some of the money was on deposit in the First

National Bank of American Falls at the time it failed. These deposits are stated to be as follows:

$1168.73	as to	Improvement	District	No. 1
60.51	" "	"	"	" 2
2155.95	" "	"	"	" 8
3031.15	" "	"	"	" 9

The difference between the principal of the bond issues in the improvement districts and the amount set up on the assessment roll as principal is testified to be as follows:

Dist. No. 1,	principal of bonds,	$24,000	
	assessment roll,		$23,638.04
" " 2,	principal of bonds,	7,150	
	assessment roll,		7,151.51
" " 8,	principal of bonds,	21,506.05	
	assessment roll;		22,040.20
" " 9,	principal of bonds,	25,219.25	
	assessment roll,		25,216.78

with no provision to pay the county 1½ per cent for collection. The original assessment made to pay for the improvements is by the provisions of the Idaho statute (§2010 I. C. S.) "a final determination of the regularity, validity and correctness of said assessment of the amount thereof assessed on each lot and parcel of land." As these amounts assessed were paid at the time the United States took possession of the land it acquired the same from the owners free from all liens upon the property arising from assessments then made. The bonds did not constitute a lien upon any specific piece of property and the fortuitous circumstances that all the land within three of the districts has been acquired by

the United States cannot alter the effect of the bonds or establish a lien upon the whole area for the amounts of all or any of the bonds remaining unpaid. Assuming that under §4024 I. C. S., supra, there was a right in the city to reassess by supplementary assessment upon the property within the district amounts inadvertently omitted from the first assessment roll to correct errors or mistakes in the amount assessed originally (§4024 I. C. S., supra), such amount so omitted was not and could not be a lien upon property under the terms of the law unless and until so reassessed.

Now it is conceded that the reassessments authorized by the city council of the city of American Falls in pursuance of §4024 I. C. S., supra, July 3, 1928, are void because the property assessed at that time belonged to the United States and was exempt from local taxation. This concession is apparently based upon the decision of the District Court, U. S. vs. Pierce Co., 193 Fed. 529, in an action to cancel certain taxes on lots in Tacoma, Washington, which had been purchased by the United States as a site for a postoffice, court house and customs house. It appeared in that case that although tax proceedings were under way, the lien of the tax had not accrued at the time of the transfer to the United States. It was, therefore, held that the tax was void. The statute of Washington involved in that case provided that,

"The taxes assessed upon real property shall be a lien thereon from and including the first

day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday of February of the succeeding year."

The Court there said:

"The transfer of title to the United States operates to withdraw the property from all the effects of subsequent state action and subjects it to the sole jurisdiction of the United States. As to such property all incomplete state proceedings must fall. To hold otherwise would be to hold that board of equalization, boards of county commissioners, and city councils can meet and deliberate as to the valuation for taxation purposes of property over which the government of the United States vested with the power of exercising 'exclusive legislation in all cases whatsoever,' and can by their votes and proceedings determine how large or how small a tax such property shall be required to pay."

The Court in that case cites Bannon vs. Burns (C. C.), 39 Fed. 892, with relation to a federal building, stating that,

"By the city charter the lien for taxes attached on January 1st, but the levy was not actually made until the third Monday in April. This site was acquired by the United States on April 9th, and it was held not subject to taxation by the city for that year."

These cases (U. S. vs. Pierce, 193 Fed. 529, supra; Brannon vs. Burns, 39 Fed. 982, supra), are cited with approval and followed by the Circuit Court of Appeals of the Second Circuit in the late case of U. S. vs. Buffalo, 54 F. (2d) 471. In the latter case the charter of the city of Buffalo provided that the taxable status of all property should be fixed each year on the first day of December for the following fiscal year; that the assessment roll should be completed on or before the first day of March, whereupon notice that the assessment rolls have been finally completed should be published by the assessor and on the first day of June the assessor should give notice that the payment of local assessments returned on the general tax rolls ½ on city tax, etc., shall be payable and that

> "all taxes, assessments, together with interest thereon as provided by law should be liens upon the land upon which they are assessed from the time of publication of the notice by the assessor required by this section, until paid, and shall be preferred in payment to all other charges."

The United States acquired the property by deed dated April 16, 1920. The majority of the Court stated:

> "By the defendant's charter, therefore, the publication of this notice [by the assessor] was necessary to create a lien on the property for these taxes."

It was therefore held that although the statute provided that the lien should relate back to the 1st of March which would antedate the acquisition of the property by the United States, that the lien not having attached at that time and publication of notice being a condition precedent to the creation of a lien that there was no valid lien when the Government took title. Accordingly, the Court said,

> "We entertain no doubt that when the United States took title the property was unencumbered by any lien for taxes. * * * The important reason no such lien could come into being without the consent of the federal government after it took title lies in the fact that taxation of the property of the United States depends wholly upon the will of its owner."

Circuit Judge L. Hand, however, dissented from this view and in a concurring opinion stated as follows:

> "On the other hand I do not understand it to be disputed that when the United States takes over property, it takes it subject to whatever liens are upon it, tax liens like the rest. If the law of a state were that all taxes should be liens as of March first, the time of the assessment, but might be computed, levied and extended on the rolls before July first, I see no reason why they should not be a lien upon land conveyed to the United States on March second. The act of liquidating and formally imposing the tax would not in my judgment be in de-

feasance of the sovereignty of the United States. I cannot agree with the contrary ruling in U. S. vs. Pierce Co. (D. C.), 193 F. 529. Hannon vs. Burnes (C. C.), 39 F. 892; contains a dictum in accord, but it was altogether unnecessary to the result. The levy and extension on the rolls are not adversary proceedings against the United States, like an arrest or seizure of its property; they do no more than fix the amount of a charge already imposed, and the liquidation does not depend upon questions in which the United States is interested except as all other owners of property. They are not directed against it individually, as is a suit, or a condemnation."

While it is conceded in the case at bar that the assessment made by the city of American Falls was void by reason of the fact that the Government owns the property subjected to the assessment, we are inclined to agree with the position taken by Circuit Judge L. Hand in his concurring opinion. If then we assume that the city had a right to make a supplementary assessment to correct inaccuracies and inadvertences in the first assessment after the transfer to the United States it follows that this right was not "taken" or lost by the transfer of the property in the district to the United States. If, on the other hand, there was no longer a right to reassess the property, nothing was taken by the United States, for the reassessment itself was an essential prerequisite to any enforcement of the

right of the bondholder in and to any specific piece or pieces of property within the district. It was essential that such reassessment should follow the original apportionment of benefits made under and by virtue of the authority of the legislature of the State of Idaho as embodied in its statutes. Until such a reassessment authorized by statute had been imposed upon the property the bondholders had no right which could either be enforced by them in any or all the property in the improvement district or interfered with by the Government. The apportionment of the amount included in the assessment or reassessment was essentially an act of the taxing power. Until that power had been exercised there was no method of enforcing the inchoate rights of the bondholders except by proceedings having for their purpose the compelling of city authorities to exercise their power. (Lumbermen's Trust Co. vs. Town of Ryegate, 61 F. (2d) 14.) We are not wholly without authority on this point. In the case of Beezley vs. City of Astoria, 269 Pac. 216, the Supreme Court of Oregon had under consideration the effect of the judgment quieting the title of the owner as against an assessment for street improvements where reassessment was subsequently made to correct errors invalidating the first assessment under a charter of the city of Astoria making provision for such reassessment. It was held that the judgment quieting the owner's title against the city did not affect the right of reassessment for the reason that such right was not a claim or interest

in the real estate. The Court stated the proposition thus:

> "While the courts have placed a liberal meaning upon the words 'claim' and 'interest' when found in such statutes (citing cases) we know of none so inclusive that it would include this quiescent duty which required legislative action before it could be converted into a potent claim. The property's duty constituted the foundation for valid legislation. But, without it, the duty was not a legal liability. This was the conception developed in Brown vs. Silverton, 97 Or. 441, 190 Pac. 971. Hence we do not believe that this moral duty constituted a claim, interest, or estate in the plaintiff's properties which the city was compelled to set forth lest it be swept away by a default decree."

The charter of Astoria (§80) provided, in effect that

> "whenever any assessment for street improvement shall be set aside or its enforcement enjoined by any court, or when the council shall be in doubt as to the validity of such assessment or any part of it, it may by ordinance make a new assessment; the re-assessment shall become a charge upon the property."

The Court quotes with approval the language of Judge Wolverton in Thomas vs. Portland, 40 Or. 50, 66 Pac. 439, as follows:

> "The rationale upon which such curative legislation proceeds is that there has been a futile-

> attempt to levy an assessment, where the parties affected are in justice and in equity bound to contribute to the public demand, and that they ought not to be permitted to escape the burden by reason of some oversight or non-observance of the prescribed mode of proceeding in the first instance, where the irregularities do not extend to an act or omission that the legislature is without power to authorize primarily. In all such cases the legislature may prescribe a new remedy, so as to require payment, when justice and equity demand it."

To a similar effect is Duniway vs. Portland, 47 Or. 103, 81 P. 945, where, referring to such curative legislation it is said that it

> "is designed to supply a curative procedure to supplement the preceding one that has failed. It awards a new and supplementary remedy for impressing upon the abutting property a lien for the cost of the special benefits, not to exceed the original cost of the improvement because of the failure in the first instance to carry the undertaking to a successful termination."

In Beezley vs. Astoria, supra, in disposing of the contention that the first judgment quieting title against the lien of the first assessment was res judicata, the Court likened the first judgment to one quieting title against the mortgage lien, stating that this did not extinguish the debt, and by analogy, held that the right of reassessment was analogous

to the right of a mortgagor to recover his indebtedness although his lien was lost. Upon that subject we quote from the opinion as follows:

> "Hence we cannot say that the equitable debt chargeable against the plaintiffs' premises was necessarily adjudicated when the city suffered the decree quieting title to be entered. It is perhaps needless to cite authorities to the effect that the adjudication of a lien against the claimant does not extinguish the debt secured by it."

In view of the statute of Idaho which makes the assessment a lien from the time it is made, and the above definition of a similar right of reassessment by the Supreme Court of Oregon which we consider sound, it is clear that the right to a reassessment, or a supplementary reassessment, does not rise to the dignity of a lien upon or claim to the several pieces of land which are included in the improvement district. At most there is a moral right which the legislature of the state can recognize and enforce and which it has recognized by the statute authorizing a supplementary assessment to cover mistakes or inadvertences in previous assessments (Stats. §4024 I. C. S., supra; see also Columbia Heights Realty Co. vs. Rudolph, 217 U. S. 547, 554; Reiff vs. City of Portland, 141 Pac. 167; Cowart vs. Union Paving Co. (Cal.), 14 Pac. (2) 764, 767). Until the authorized action is taken the bondholder or the city representing him has an inchoate interest in the specific pieces of property

predicated upon the moral and legal right to reassess in the case of the invalidity of the original assessment or to supplement the original assessment in the event of its insufficiency by reason of mistakes or inadvertences.

It follows from what we have said that the United States is not liable for an appropriation of an interest of the bondholders in the property within the improvement district, for they had no interest at the time the United States Government acquired title, nor had they such a lien at the time the property was flooded. In the absence of a lien for said bonds the complaint of the bondholder is reduced to the proposition that the acquisition of the property within the district by the United States prevented the effective enforcement of this inchoate moral right of reassessment and therefore that their property has been taken by the United States and that an implied promise to pay the balance due upon the bonds arose from the act of taking this inchoate right. In the case at bar brought under the Tucker Act we are not dealing with the moral obligations of the Government arising from the interference with the plaintiff's rights, if any, but with the more limited question as to whether or not the plaintiff is empowered to sue the sovereign by the permissive terms of that act which only authorizes suits upon contracts express or implied. The plaintiff's proposition, therefore, is that there is an implied contract on the part of the Government to pay the amount

of the inchoate liens which otherwise might have matured into actual liens by reassessment.

Even if we assume that there was a valid lien upon the property acquired by the Government, another difficulty with the theory of an implied promise on the part of the Government to pay the lien arises from the proposition that the mere purchase of land by an individual within the limits of the district creates no liability on the part of the owner to pay an assessment upon his land or to pay the bonds of the district. There is no personal obligation. It is a lien upon the land which he can pay or not, as he pleases. It must be conceded that by the mere acquisition of the land in question the Government was under no greater obligation by reason of its purchase, consequently, that there was no personal obligation to be reduced to personal judgment by an action brought under the Tucker Act unless it be by reason of the fact that the bond owners can no longer invoke the remedies provided by the Idaho statute for the collection of the amount due them by a suit to foreclose the lien of the assessment, for the reason that such a suit cannot be brought against the United States Government to enforce a lien upon the lands of the Government, not because there is any difference in the moral obligations of the Government as distinguished from those of private individuals, but by reason of the doctrine that the sovereign power cannot be sued in its own courts without its consent. It is therefore argued in effect that inasmuch as the Govern-

ment has not consented to the foreclosure of lien upon its land it must be deemed to have agreed to pay the amount which would be realized from such a foreclosure. In short, it is contended that the refusal of the sovereign to permit a foreclosure suit to enforce a lien against property acquired by it for public purposes amounts to a taking of the lien from which taking an implied contract to pay therefor arises from which a consent to sue the United States is derived. Thus, from a refusal (or failure) to permit a suit to be brought against the United States a consent thereto is to be implied. This does not seem to be a tenable position. If we are correct in this analysis of plaintiff's position that the alleged taking arises from the inability to enforce the lien against the Government; then such taking occurred more than six years before suit was brought, namely, when the Government acquired the property for a reservoir site. Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose. The suit is too late and the District Court had no jurisdiction thereof under the Tucker Act. We place our decision also upon the ground that there was no enforceable lien upon the property acquired or used by the United States either at the time of its acquisition or use, and, hence, there was no taking of private property.

Judgment reversed with instructions to enter a judgment upon the pleadings and findings in favor of the United States, dismissing the action for lack

of jurisdiction. Claimant must seek such redress as may be appropriate from the Congress.

[Endorsed]: Opinion. Filed January 23, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6867

UNITED STATES OF AMERICA,

Appellant,

vs.

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a Corporation,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the District of Idaho, Eastern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be,

and hereby is remanded to the said District Court with instructions to enter a judgment upon the pleadings and findings in favor of the United States dismissing the action for lack of jurisdiction.

[Endorsed]: Judgment filed and entered January 23, 1933. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the twenty-first day of March, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellee, filed February 16, 1933, for a rehearing of above cause, be, and hereby is denied.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred thirty-five (235) pages, numbered from and including 1 to and including 235, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of March, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 237] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,600. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 32. The John K. & Catherine S. Mullen Benevolent Corporation, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed April 24, 1933. File No. 32, O. T. 1933.

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CHARLES ELM

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

No. [redacted] 32

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,

—vs—

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit
and
SUPPORTING BRIEF

W. G. BISSELL,
BRANCH BIRD,
Of Gooding, Idaho
Attorneys for Petitioner

H. E. RAY,
U. S. Atty. for District of Idaho,

W. H. LANGROISE,
SAM S. GRIFFIN,
RALPH R. BRESHEARS,
Asst. U. S. Attys. for District of Idaho,
All of Boise, Idaho

B. E. STOUTEMYER & SPENCER L. BAIRD,
Dist. Counsel, Bureau of Reclamation,
Of Portland, Oregon,
Attorneys for Respondent.

Filed April ....., 1933,

..... Clerk.

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*During the pendency of this suit the official designation of the Idaho statutes has been changed from "C. S." (Compiled Statutes of Idaho, 1919), to "I. C. A." (Idaho Code Annotated, 1932). To conform to the record and prior opinions, the new designation is not used in the petition and brief, except that the corresponding numbers are shown in this index.

Note: All emphasis upon quotations or parts thereof in this brief are supplied by the authors.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,
—vs—
United States of America, Respondent.
No. .....

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:—

Your petitioner respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED

In 1915 and 1916 three local improvement districts were organized in the city of American Falls, under the provisions of §§ 3999, et seq. I. C. S. An abstract of these statutes is necessary to a full understanding of the issues. The first step is the ordinance declaring the intention to create the improvement, describing the particular property or section of the municipality to be improved, designating

the general character of the improvement, estimating the cost thereof, and advising that the cost is to be assessed against the contiguous property (§ 4003 I. C. S.). Provision is made for protests, and then follows the ordinance creating the improvement district, which "shall provide that such improvement shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district" proportionately (§ 4005 I. C. S.). Section 4007 I. C. S. provides:

> "Whenever any **expense or cost of work** shall have been assessed on any land the amount of **said expenses shall become a lien upon said lands,** which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure * * *"

The municipality may "provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, **which shall include the adjoining, contiguous, and approximate property** liable to assessment for such local improvements payable in instalments of equal amounts each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years * * *" (§ 4014 I. C. S.). The latter section further provides that other and subsequent series of bonds may be

issued for the improvement of property in the same district, but the lien of the second or third series of bonds "shall be a subsequent lien * * * to the unpaid, unliquidated and unredeemed outstanding bonds, theretofore issued for the original improvement * * *" Provision is made for annual levies to meet instalments and interest (§ 4017 I. C. S.), the form of the bonds (§ 4018 I. C. S.), and for the redemption of their lots by the respective owners, in which event such property "shall not thereafter be liable for further special assessments for the cost of such improvements **except as hereinafter provided.**" (§ 4019 I. C. S.). Section 4024 I. C. S. provides, in part:

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by the owners of property in the local assessment district where the same is made, it shall be lawful, and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessments to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy."

If the municipality neglects or fails to pay the bonds or collect the assessments when due, the bondholder may foreclose his lien in an action in his own name, recovering costs, attoreys fees and a five per cent penalty," in addition to the amount of such bonds and interest there-

on", and "**such bonds shall be equal liens upon the property** for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land." (§ 4023 I. C. S.) The municipality is not liable, except for the collection of the assessments (§ 4026 I. C. S.).

The foregoing statutes govern the creation of districts for the improvement and building of streets. Under such provisions district No. 8 was created. The ordinances pertaining thereto and full transcript of the proceedings will be found in plaintiff's exhibit 6 (R. 142).

Districts for the construction of sewers are governed by §§ 4121 to 4151, inc., I. C. S. The latter are substantially identical with the provisions relative to street improvements. Districts Nos. 1 and 2 were created under the latter statutes. The ordinances pertaining thereto and full transcripts of the proceedings will be found in plaintiff's exhibits 4 and 5, respectively (R. 142).

Bonds were issued by the three foregoing districts and were purchased by J. K. Mullen, who transferred the same to petitioner (R. 63, 65, 68). All of the bonds are payable to bearer. The bonds remaining unpaid appear as plaintiff's exhibits 1, 2, and 3, respectively (R.141, 142). The original assessments levied proved insufficient to pay the bonds for the following major reasons, as pointed out by witness Bowen (R. 111-118): 1) Lack of

conformity between the denominations of the bonds and the collections realized from the assessments from time to time, resulting in moneys remaining idle frequently; 2) In making the original assessments and levies no allowance was made for the 1½% collection fee (R. 117), which §3224 I. C. S. allows the county for collecting levies of such improvement districts; 3) The set-up on the assessment rolls for interest did not provide for interest on the bonds the first year, resulting in the use of money received for principal payments to meet interest requirements (R. 117-8); 4) Insufficient interest charges on delinquent taxes as compared with interest on bonds (R.118); and 5) Non-payment of taxes by some of the owners in the improvement districts. Therefore, reassessment ordinances were enacted by the municipality in July, 1928 (plaintiff's exhibit 16, R.144), apparently under authority of § 4024 I. C. S., supra, p. 3. The latter section governs reassessments in districts for street improvements. A similar section (4141) governs reassessments in sewer districts. The trial court found that these reassessments were made by the municipality "in compliance with the statutory mandate and for its own protection." (R. 70).

Beginning in 1920 or early in the spring of 1921 and between such date and 1926 (R. 131), the respondent purchased or condemned all of the lands embraced within the three above improvement districts as a site for Recla-

mation Act storage reservoir, under authority of the act of June 17, 1902 (43 USC'A §§ 411, et seq.). However, no proceedings in eminent domain were had against the petitioner or its successor in interest, J. K. Mullen (R.71, 72), and therefore the effect of any condemnation proceedings is not in issue. Apparently condemnation was resorted to only in the case of the twelve or fourteen pieces of land occupied by the dam proper (R.135). The lands were largely acquired by individual purchase contracts between the respondent and the individual owners, a sample of such contracts appearing as defendant's exhibit No. 1 (R.144). These contracts required each owner to convey his land to the United States within sixty days after the government notified such owner that his contract had been approved by the Bureau of Reclamation. The following words of paragraph 7 of such contract are pertinent:

> "7. Liens or encumbrances existing against said property may, at the option of the United States, be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved. * * *"

The foregoing contract bears date December 9, 1925, but the date of none of the other contracts appears in the record. The deeds which were executed at later, but unknown, dates permitted the owners to remove the buildings from their respective lands not later than January 1,

1927 (R.199). The last building actually removed from the reservoir site was the Grand Hotel, which was late in the winter of 1925 or early in the spring of 1926 (R.123). The reservoir started filling in 1926, and the entire reservoir site was flooded "on or shortly after January 1, 1927." (R. 76). Naturally, the purchase of these lands by respondent and the complete flooding of the lands comprising said improvement districts Nos. 1, 2, and 8 rendered petitioner's property entirely valueless. Thereby petitioner's valuable bonds were permanently and absolutely transformed into worthless scraps of paper.

The government officials in charge at the dam site knew of petitioner's unpaid bonds, and consonant with the authority contained in the above quoted paragraph seven of the contracts of purchase (R.133), held $13,000 or $14,000 out of the amounts agreed to be paid to the individual owners, for the purpose of paying such bonds. This sum was retained by the respondent's agents until "some time in 1929 before they paid it to the land owners* * *" (R.134, 135). Soon thereafter, and on November 25, 1929 (R.7), the immediate action was filed under the provisions of the Tucker Act (28 USCA §41, subd. 20), upon the theory that respondent's actions constituted the taking of private property for public use without compensation.

Upon this theory the trial court overruled the demur-

rer to the amended bill (John K. & Catherine S. Mullen Benevolent Corporation v United State, 40 Fed. (2) 937), and upon this theory the trial court decided the case upon its merits in favor of petitioner (R.196, et seq.), rendering judgment in the amount of the unpaid bonds held by petitioner, with interest, less certain amounts theretofore collected and lost by reason of the failure of the bank in which same were deposited (R.77, 78). The Circuit Court of Appeals for the Ninth Circuit, by an opinion filed January 23, 1933 (63 Fed. (2) 48), reversed the judgment in favor of petitioner, primarily upon the conclusion that petitioner had no interest in, or lien upon, the property within said improvement districts at the time the respondent acquired title, nor had it such a lien at the time the property was flooded (R.231); and secondarily, upon the conclusion that the suit was filed too late, giving the court no jurisdiction under the Tucker Act (R.233). These two questions are the principal ones to be considered in this petition.

A petition for rehearing filed by petitioner was denied by the Circuit Court of Appeals on March 21, 1933 (R. 235).

This proceeding does not embrace district No. 9, nor the action predicated thereon,—United States v J. K. Mullen Inv. Co., 63 Fed.(2) 56.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision so rendered by the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of other circuit courts of appeals, in conflict with the weight of authority and in conflict with the applicable decisions of this Court, in the following major particulars, to-wit:

1. The action of the respondent and its agents in purchasing all the property within said three improvement districts and particularly in causing the same to be permanently flooded with the reservoir waters, without recognizing or paying petitioner's bonds, constituted the taking of private property for a public use without compensation, within the meaning of the Fifth Amendment to the Federal Constitution, in that said action naturally and necessarily resulted in the complete and permanent taking, confiscation and destruction of petitioner's bonds and every element of property represented thereby, including the liens of said bonds upon said lands, which bonds are property and would have been valid and enforceable but for the action complained of:

Bowers v Bloomfield, 86 Atl. 428, 45 LRANS 451;
United States v Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;
United States v Lynah, 188 U. S. 445, 47 L. Ed. 539;
United States v Cress, 243 U. S. 316; 61 L. Ed. 746;
Pumpelly v G. B. & M. C. Co., 13 Wall. 166. 20 L. Ed. 557;
Farbwerke, et al. v Chemical Foundation, 39 Fed.

(2) 366; (affirmed 283 U. S. 152, 51 S. Ct. 403)
Morrison v Clackamas County (Ore.), 18 Pac. (2) 814;
Knowles v New Sweden Irr. Dist., 101 Pac. (Idaho) 81;

2. In deciding that the action was filed "too late," because not filed within six years of the date "the government acquired the property for a reservoir site" (R.233), the Circuit Court effectively determined that the execution of said contracts of purchase (defendant's exhibit 1) vested the full and absolute fee to the respective properties in the government, and afforded petitioner right of action immediately, the court apparently overlooking the fact that said contracts were merely agreements to convey at some indefinite future date, as well as the further fact that said contracts expressly recognized the possibility of valid liens and encumbrances, to discharge which the government was expressly authorized to withhold funds from the purchase price (par. 7, deft's ex. 1—see text thereof p. 6, supra). Petitioner's right of action against the United States accrued, not when the respective landowners' interests in the property were taken, but when petitioner's interests were taken. "The Fifth Amendment does not entitle him to be paid in advance of the taking."

Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267;

3. If the court is correct in concluding that petitioner's

right of action accrued when the government acquired said lands, that is, when the contracts were executed, nevertheless it erred in concluding that the suit was filed too late because the record does not reveal the dates of any of the contracts, except one which bears date December 9, 1925 (defendant's exhibit 1 - R.144). The only other showing is that the first lot was acquired in 1920 or 1921, and the balance were acquired "between that time and the year 1926" (R.131). The suit was filed November 25, 1929 (R.7), but no one can know from this record that any lot, other than the first one so acquired, was actually purchased more than six years before the institution of the suit, and it is clear that the Dahlen lot (defendant's exhibit 1) was acquired within the statutory period of six years fixed by the Tucker Act. The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it. This burden was not met by respondent and the plea of limitations cannot be sustained:

Johnston v Keefer, 280 Pac. (Idaho) 324;
37 C. J. 1243, note 59;
17 R. C. L. 1004;
Warner v Wickizer, 294 Pac. (Okl) 130;
Jackson v United States, 24 Fed. (2) 981; 281 U. S. 344, 50 S. Ct. 294;
Borland v Haven, 37 Fed. 394;
Haven v Borland, 159 U. S. 255, 40 L. Ed. 140.

Wherefore, your petitioner respectfully prays that a

writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceedings in said Circuit Court of Appeals had in cause bearing docket number 6867, entitled, United States of America, appellant, vs. The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and the rules of this Court, and the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as this Court may deem proper.

Dated at Gooding, Idaho, this 18th day of April, 1933.

THE JOHN K. & CATHERINE S. MULLEN BENEVOLENT CORPORATION, A CORPORATION,

By: W. G. BISSELL

BRANCH BIRD

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

STATE OF IDAHO }
County of Gooding } ss.

W. G. Bissell, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; and that this petition is presented in good faith, and the same is not interposed for delay.

W. G. BISSELL

Subscribed and sworn to before me this 18th day of April, 1933.

P. T. SUTPHEN,
Notary Public, residing
at Gooding, Idaho.

(SEAL)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,

—vs—

United States of America, Respondent.

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court of the United States for the District of Idaho, Eastern Division, in the above cause, upon demurrer is reported in 40 Fed. (2) 937, the opinion of said district court upon the merits appears at pp. 196, et seq. of the record herein, and the opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 63 Fed. (2) 48, and also appears at pp. 207, et seq. of the record herein. The order of the latter court, entered March 21, 1933, denying the petition for rehearing, is shown at p. 235 of the record herein.

II.

JURISDICTION

a. The judgment of the district court was entered January 28, 1932 (R.78), while the opinion of the circuit court was filed January 23, 1933 (R.234), and the latter court's order denying petition for rehearing was filed March 21, 1933 (R.235).

b. The constitutional and statutory provisions which are believed to sustain the jurisdiction of this court are: The Fifth Amendment to the Constitution of the United States, which provides, "* * * * nor shall private property be taken for public use, without just compensation." (U. S. C. A., Const., Part II. p. 546); and the Tucker Act (28 U. S. C. A., §41, subd. 20), giving federal district courts concurrent jurisdiction of claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any contract, express or implied, with the Government of the United States, provided suit shall have been filed within six years after the right accrued for which claim is made.

c. Under authority of the statutes abstracted in the "Summary Statement," beginning on p. 1 hereof, local improvement districts were created in American Falls, Power County, Idaho, in the years 1915 and 1916. In regular course bonds were issued for the purpose of paying the costs and expenses of such improvements. These

bonds, which are payable to bearer (R.17), were originally sold to J. K. Mullen, who transferred the same to petitioner (R.63, 65, & 68). From time to time payments were made upon the bonds by means of annual assessments levied and collected by the municipal authorities, but all the bonds have never been paid,—$8,104.79 being the net amount unpaid as of date November 23, 1929 (R. 74). The bondholder has no claim against the municipality, his remedy, in case of non-payment, being confined to the enforcement of said assessments (R.19).

For the purpose of acquiring a Reclamation Act storage reservoir site, under authority of the act of June 17, 1902 (43 U. S. C. A. §§ 411, et seq.), agents and employees of the United States purchased the lands within said three local improvement districts from the individual owners. The first of these purchases was in 1920 or 1921 and the last in 1926 (R.131). Some of the lands were condemned, but no proceedings in eminent domain were had against petitioner or its predecessor in interest (R. 71 & 72). A sample of the contracts between the United States and the individual owners appears in the record as deft's. ex. 1 (R.144). These contracts required each owner to convey his respective land to the United States within 60 days after the Government notified such owner that his contract had been approved by the Bureau of Reclamation, and they authorized the Government to discharge any

liens or encumbrances existing against a particular lot by reserving from the purchase price whatever amount might be necessary therefor. The record does not show the date of any deed and only shows the dates of two of the contracts of purchase, namely, the first contract, which was in 1920 or 1921, and said sample contract, which bears date December 9, 1925. The Government officials proceeded with their work, the reservoir started filling in 1926, and filled in 1927 (R.131).

July 3, 1928, the city of American Falls, in conformity with its statutory duty, enacted reassessment ordinances (R.144). Apparently, these ordinances were enacted under authority of §4024 I. C. S., supra p. 3. In brief, these ordinances recite that prior assessments have proven insufficient to pay the bonds and interest thereon, fix the unpaid balance, and direct a reassessment of all property within such districts which was subject to such levies.

The Government officials in charge of the construction of the reservoir knew of petitioner's claims and withheld $13,000 or $14,000 from the amounts the Government had agreed to pay the owners of the property within the districts for the purpose of paying the same. Some time in 1929, this money was paid to the land owners (R.134). The immediate action was instituted November 25, 1929 (R.7).

The reassessments proved futile because the property

subject thereto had been completely appropriated by the Government and flooded. The money withheld by respondent from the owners to pay petitioner's bonds was paid to the owners, and since neither the municipality, the districts, nor the property owners are personally liable upon said bonds, petitioner's property, the bonds and every element of property represented thereby, was completely and permanently taken from it, within the meaning of the Fifth Amendment as interpreted by this court. Under such conditions, it is respectfully urged that the circuit court erred in concluding that "the United States is not liable for an appropriation of an interest of the bondholders in the property within the improvement district, * * *" (R.231), and that the cause is within this court's jurisdiction.

The nature of the immediate action is that of a suit against the Government upon an implied contract for the taking of the private property of petitioner for a public use, without compensation and without condemnation proceedings of any kind.

d. The cases believed to sustain said jurisdiction include the following:

United States v Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;
Bowers v Bloomfield, 86 Atl. 428, 45 LRANS 451;
United States v Cress, 243 U. S. 316, 61 L. Ed. 746;
United States v Lynah, 188 U. S. 445, 47 L. Ed. 539;
Pumpelly v G. B. & M. C. Co., 13 Wall. 166, 20 L.

Ed. 557;
Farbwerke, et al. v Chemical Foundation, 39 Fed. (2) 366; (affirmed 283 U. S. 152, 51 S. Ct. 403);
Morrison v Clackamas County (Ore), 18 Pac. (2) 814;
Knowles v New Sweden Irr. Dist., 101 Pac. (Idaho) 81;
Bosworth v Anderson, 280 Pac. (Ida.) 227, 65 A. L. R. 1372.

STATEMENT OF THE CASE

A statement of the case will be found in the petition for certiorari (pp. 1-8 hereof), under the heading "Summary Statement * * *," and to avoid repetition that statement is referred to and adopted as the "Statement of the Case" of this brief. Such statement is supplemented slightly by the statements in part II-c, beginning on p. 15 hereof. In the argument more detailed references will be had to the facts and evidence.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED

1. The Circuit Court of Appeals erred in concluding that the United States did not take and confiscate petitioner's bonds and property, within the meaning of the Fifth Amendment, when it completely and permanently flooded the lands within the improvement districts in question, thereby destroying said bonds and every vestige of property represented thereby.

2. The Circuit Court of Appeals erred in concluding that the immediate action was instituted "too late".

V.

SUMMARY OF THE ARGUMENT

A. Petitioner's bonds in and of themselves, and regardless of whether or not they are secured by liens upon the property in the improvement districts in question, constitute "property" within the meaning of the 5th Amendment, and as such are entitled to full protection.

B. The right of petitioner, as the holder of outstanding and unpaid bonds of the improvement districts, to have reassessments levied under the provisions of §§ 4024 and 4141 I. C. S. to insure payment of its bonds, constituted such a property right as the 5th Amendment protects.

C. Petitioner's bonds were actual and existing liens upon the lands within said improvement districts at the time said lands were taken by the government for public purposes. The government has taken these liens in a constitutional sense, and it has thereby become liable upon an implied contract to pay therefor.

D. The taking of petitioner's bonds and property, whether said bonds be considered as secured by liens or not, constituted such a taking of private property for public use without compensation as to render the government liable upon an implied contract.

E. Petitioner's bonds and property rights were not ac-

tually taken to such an extent as to afford petitioner a cause of action until the reservoir site was actually flooded about January 1st, 1927, hence the suit filed in 1929 was within the six year period fixed by the Tucker Act.

F. The statute of limitations is an affirmative defense and the one asserting it must prove every essential element thereof. The government has not established by any form of evidence the dates of the respective purchases from the land owners, therefore, it cannot be determined that the immediate action was filed too late, even upon the theory of the Circuit Court, to the effect that petitioner's cause of action accrued when the purchases were made of the land owners' equities in the various parcels and lots in the three districts.

VI.

ARGUMENT

The Circuit Court of Appeals seems to have denied petitioner relief on the ground (as to the constitutional phases of the controversy) that at the time when the United States took the land within said improvement districts for a reservoir site petitioner merely had "inchoate liens which otherwise might have matured into actual liens by reassessment." (R. 232). It is respectfully contended that this determination is erroneous for three principal reasons. In the first place, it ignores the fact that petitioner's bonds in and of themselves, and regardless

of whether or not they were secured by a lien upon the lands taken for reservoir purposes at the particular time the United States took such land, constituted valuable property, and were entitled to the full protection of the Constitution. In the second place, if such bonds were only "inchoate liens," they were at least choses in action and equally entitled to the protection of the Constitution. In the third place, the bonds actually constituted liens upon the lands within the improvement districts at the time the Government took such lands, and the Government officials had actual and constructive knowledge thereof.

The foregoing is petitioner's general position upon the constitutional question involved. Argument more in detail follows.

POINT A

PETITIONER'S BONDS THEMSELVES, REGARDLESS OF WHETHER THEY ARE SECURED BY LIENS, CONSTITUTE PROPERTY WITHIN THE MEANING OF THE FIFTH AMENDMENT, AND ARE ENTITLED TO PROTECTION.

In considering this point, we ask the court to forget for the time being all questions about liens, remembering only the undeniable fact that petitioner was the owner of bonds worth in excess of $8,000, which were enforceable and worth their respective face values, together with interest, "before and at the time of the taking" by the United States (R.72).

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. Despite this provision, the United States has taken the bonds of petitioner, which the trial court found were worth their respective face values, and their face values totalled $8,104.79 (R. 74). No compensation has been made to petitioner for these bonds. There should be no doubt about petitioner's property coming within the meaning of the term "property," as the same is used in the Fifth Amendment, because as that term is used in the Fifth Amendment it embraces every form of property which the law recognizes and protects. 12 C. J. 1212; 10 R. C. L. 74 § 65; Spring Valley W. Co. v San Francisco, 165 Fed. 667, 676. This provision of the Constitution protects real and personal property alike. 20 C. J. 665. In the case of Liggett & Myers Tob. Co. v United States, 274 U. S. 215, 47 S. Ct. 581, this court applied this doctrine to the taking without compensation of personal property in the form of tobacco. While the same principle was applied in the case of Brooks-Scanlon Corp. v United States, 265 U. S. 106, 68 L. Ed. 934, where a shipbuilding contract and rights thereunder were expropriated by the Government, the court saying in part:

> "The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property, and not the cost of it, that is

protected by the 5th Amendment."

Without referring to other decisions, it seems clear that the Fifth Amendment protects private rights in all manner of lawful property from being taken by the Government for a public use without just compensation. The property so protected is not limited to lands and such visible forms of property, but includes personal property, contract rights, and intangibles as well. Unquestionably petitioner's bonds are "property" as such expression is defined by the foregoing authorities. Such being the case, the Circuit Court's opinion is patently erroneous because it concludes that the United States is not liable to petitioner, primarily on the ground that petitioner had no interest in or lien upon the physical property within the improvement districts bonded by the reservoir. In other words, the United States has appropriated and converted petitioner's property for a public use, pursuant to an act of Congress, and without compensation, and thereby it has become liable to petitioner upon an implied contract. Whether the bonds so expropriated were secured or unsecured cannot affect the result in either event the property has been taken and the liability of the Government has accrued.

POINT II

THE RIGHT OF PETITIONER TO HAVE ITS ASSESSMENTS LEVIED UNDER PROVISIONS OF § § 4024 & 4141 I. C. S. TO INSURE PAYMENT OF ITS BONDS CONSTITUTED "PROPERTY" WHICH THE 5TH AMENDMENT PROTECTS.

The Circuit Court seems to have concluded that the property rights of petitioner which the Government expropriated were "inchoate liens which otherwise might have matured into actual liens by reassessment." (R. 929). As must be concluded from a consideration of this brief, petitioner differs radically with the Circuit Court's view, but if we concede for the sake of the argument that the only property "taken" was in the shape of "inchoate liens," does it follow that petitioner should not be compensated therefor if such "inchoate liens" were valuable, private property before the "taking" and the same are now worthless?

An inchoate lien is a property right and is generally entitled to protection equally with a completed lien. It is generally held that a mortgage or encumbrance upon real estate is property within the meaning of the Fifth Amendment. Morgan v Willman, 58 A. L. R. 1518, and note. As stated above (p. 23), this court has held that a ship-builder's contract and his rights thereunder constitute property. In the case of Farbwerke, et al., v

Chemical Foundation, 39 Fed. (2) 366 (affirmed in this court, 283 U. S. 152), the court held:

> "(5-7) The right to the accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution." (p. 371)

Perhaps the case of Bowers v Bloomfield, 86 Atl. (N.J.) 428, 45 LRANS 451, involves facts more nearly analogous to those now before the court than any other reported case. There, pending the making of improvements in a similar district and the levying of the assessment for such work, the county park commission instituted condemnation proceedings. While such condemnation proceedings were pending, the assessments were made and confirmed. The money was paid into court, and the question was whether the assessments should be satisfied from such funds. The court reasoned that a land owner is only entitled to just compensation for what was actually taken from him; that he is not to gain by reason of the condemnation proceedings at the expense of his neighbors; that such "just compensation" is the amount the landowner would have received had he been willing, but not compelled, to sell; that a buyer and seller would have taken into account the fact that the improvement work had been done and that assessments would certainly have

been levied in a few months, and would have deducted such assessments from the purchase price. And the court further significantly says:

> "The right of the municipalities to levy the assessment is none the less a **property right** because it is in the nature of a chose in action not yet reduced to possession; it is a claim upon the land of which every well-advised buyer and seller would take notice, and for which both would allow in the purchase price."

The latter case positively holds that the right to have reassessments levied, which right the Circuit Court of Appeals denominates "inchoate liens," is a property right and as such entitled to protection under the constitutional clause forbidding private property being taken for a public use without just compensation. The foregoing authorities demonstrate that every legitimate form of property, including choses in action, contract rights, and the right of municipalities to levy assessments, are "property" within the meaning of the Fifth Amendment. Thus, if for the sake of the argument alone, we forget that the bonds in and of themselves are property in a constitutional sense, and for like purposes concede that no liens actually existed upon the property within the districts when it was taken by the Government, nevertheless it remains that the right to have reassessments levied (the inchoate liens), afforded by § 4024 I. C. S., supra p. 3, constituted "property" within the meaning of the Fifth

Amendment. As will be shown, that property was "taken" by the United States for a public purpose and no compensation has been made to petitioner therefor, clearly rendering the Government liable to petitioner upon an implied contract. Under the authorities, it is immaterial whether liens are "inchoate" or actually in existence, if they comprise valid, valuable property and are expropriated by the government, a liability immediately arises. In failing to recognize such liability the Circuit Court of Appeals erred.

POINT C

PETITIONER'S BONDS CONSTITUTED ACTUAL LIENS UPON THE LANDS WITHIN THE IMPROVEMENT DISTRICT AT THE TIME SAID LANDS WERE TAKEN FOR RESERVOIR PURPOSES BY THE UNITED STATES.

Since it is petitioner's position that its property has been taken by the government for a public use, and it is entitled to just compensation therefor regardless of whether or not the bonds were a lien upon the lands within the improvement districts at the time of the taking, the writers do not feel that it is important to discuss or decide whether such liens actually existed. However, it is apparent that the Circuit Court of Appeals denied petitioner relief primarily on the ground that such lien did not exist at the time of the taking by the Government

(R. 231), and in deference to the Circuit Court's conclusion, the question is presented.

In limine, it will no doubt be admitted that the Government had constructive notice of the existence of the unpaid bonds and their statutory claim upon the lands within the districts from the fact that the districts had been created, coupled with the fact that the statutes permitted reassessments in case the amounts produced by the first assessments proved insufficient for any cause (§§ 4024 & 4141, supra pp. 3 and 5). All these statutes entered into and formed parts of the bonds as fully as though copied bodily therein. Fidelity State Bank v North Fork H. Dist., 35 Idaho 797, 209 Pac. 449, 31 A. L. R. 781. As the trial court observed, these statutes "became one of the obligations of the bond." (R. 200).

In addition, the record abundantly proves that the Government officials in charge of the construction of the project had actual notice of petitioner's unpaid bonds. This fact appears from the testimony of the Government engineer in charge, Mr. Banks (R. 134-5), and from the testimony of the other Government witness, Mr. Bohlson, who represented the Government in negotiating for the purchase of these lands and in seeing that payments therefor were made (R. 135), who testified:

> "All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds (of petitioner) were out-

standing * * * after 1925." (R.136-7)

"* * * we held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of existing bonds." (R.136).

"This money was withheld pending a decision as to whether there was a valid lien against these lots or not." (R.137).

"I think that the government retained the sum of from $13,000 to $14,000 until some time in 1929 before they paid it to the land owners; * * * *" Banks (R. 134).

Thus it is irrefutable that the Government, not only had actual and constructive knowledge of the bonds outstanding, unpaid against these districts, but also recognized the same as valid, and retained from the land owners, more than enough to pay the same until some time in 1929. Why this money was paid to the land owners, rather than to the bondholders, is not clear from the record.

It is evident from the statutes that the legislature intended that the bonds should be sufficient in amount to meet all the cost and expense of installing the respective improvements. Bonds for street improvements are authorized by § 4014 I. C. S., which provides in part that in building any street improvement,

"* * * the cost and expense of which is chargeable to the abutting, contiguous or approximate property, they (the municipal authorities) may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs "at one time, and for such instalments they

> may issue, in the name of the municipality, improvement bonds of the district, **which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements** payable in installments" over a period of ten years.

Corresponding provisions are contained in § 4142 I. C. S., authorizing bonds in the case of sewerage districts.

It is clear from the foregoing statute that the intent was to make the bonds sufficient in amount to "provide for the payment of the costs and expenses" of the improvement, and that such bonds "shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements." Unless these bonds were liens upon the lots within the districts, how could a bond "include" all the assessable property in the district? The answer is, that the bonds, representing the costs and expenses of the improvements, are liens upon the property in the respective district. Said § 4014, full text of which is contained in appendix hereto, further makes provision for the issuance of other series of bonds for other improvement work in the same district, but provides that the subsequent series

> " * * * shall be a **subsequent lien * * * to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement** * * *"

By this statute the legislature of Idaho has clearly and unequivocally provided that the unpaid and outstanding

bonds of the original improvement constitute a first and prior lien upon the assessable property within the district. Strength is added to this statement by the provisions of § 4023 I. C. S. (for full text see appendix), prescribing the bondholders' rights and remedies. If the municipality fails to collect the assessments when due, the bondholder may proceed in his own name, "and shall recover, in addition to **the amount of such bonds** and interest thereon, 5 per centum, together with costs of such suit including a reasonable sum for attorney's fees." This is significant because the "amount of such bonds," and not the amount of the assessments, delimits the recovery. It is earnestly and respectfullly urged that the Circuit Court of Appeals did not give proper heed to these statutes when it held that these bonds were not a lien upon the lands within the district when the Government took the property (R. 231). The Supreme Court of Idaho recently held similar bonds liens upon the lands in the district in the case of Bosworth v Anderson, 47 Idaho 697, 280 Pac. 227, 65 A. L. R. 1372, from which we quote the following:

> "The respondents, Pacific States Savings & Loan Company, Equitable Loan Company and Portland Mortgage Company urge that because the assessment-roll was not filed by the county recorder, notice of the same did not become a lien and they were not charged with notice that there were assessment liens on the land on which they took the mortgages. **Hence the lien of the bonds is**

inferior to their mortgages or at least they are entitled to have the units of assessment segregated for their benefit.

"The statutes does not require these assessment-rolls to be filed. All parties are charged with knowledge of the law to the effect that C. S., title 32, chap. 163, art. 6 (local improvement district law), has been complied with; **the lien of the bonds upon the lands of an improvement district becomes fixed and paramount to any other lien excepting those of the general state,** county and city taxes. (C. S. 4013; Jenkins v Newman, 122 Ind. 99, 23 N. E. 683; Page & Jones, Taxation by Assessment, sec. 1068.)"

As a rule, the federal courts accept the ruling of the highest state court, interpreting state statutes. There does not seem to be any good and lawful reason to except the immediate situation from that general rule. The highest court in Idaho has positively held that similar "bonds" are a fixed and paramount lien upon the lands in the district, and this Idaho interpretation of Idaho laws should be followed by the federal courts.

The assessment is merely one step in a comprehensive statutory program, beginning with the ordinance of intention, followed by opportunity for protests, ordinance creating the district, taxation and assessment of "cost and expense" thereof upon all property in the district (§ 4005 I, C. S.—full text in appendix), opportunity to object to assessments, provision for bonds and instalment payments, annual tax levy, payments, refunding and reassessments. The effect of all these provisions is to make the

"cost and expense" of the improvement, as reflected by the bonds issued, a lien "first and paramount to any other lien excepting those of the general state, county and city taxes." A particular piece of land within the district is not relieved merely by the payment of the original assessment. The privilege of reassessment, afforded by said § 4024 (supra, p. 31), may and should be exercised by the municipality if the original assessment proves insufficient in amount "for any cause, mistake or inadvertence." The assessments and reassessments merely constitute a means of distributing the "cost and expense" of the improvement over the respective parcels and of collecting the amounts so distributed. The United States and all others dealing with titles within such districts are charged with knowledge of these laws and their workings. This is particularly true in instances like the immediate one, where the Government had full and complete actual knowledge of the unpaid and outstanding bonds.

It is true that an individual land owner may redeem his land from the original assessment by making payment in a lump sum, but that does not relieve him of reassessments later. As to this § 4019 I. C. S. provides:

> "When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further assessments for the cost of such improvements **except as hereinafter provided.**"

The section permitting reassessments (No. 4024) fol-

lows and is clearly within the meaning of the emphasized clause, "except as hereinafter provided". In this manner the statutes clearly contemplate that a particular piece of land within such districts is encumbered by its just share of the "cost and expense" of the improvement, i. e., the bonds, as apportioned by the original assessment, as well as any reassessment that may be necessary. In the immediate action, the Government well knew that a reassessment was necessary, it knew that the full "cost and expense" had not been paid by the original assessment. Under the foregoing statutes these unpaid and outstanding bonds were a fixed and paramount lien upon the lands in the districts at the time the Government took said property, although said unpaid balance may not have been redistributed and reapportioned by formal reassessment at the time of the taking.

The lien of the reassessment is part and parcel of, and relates back to, the original assessment. *Com'rs. of Sinking Fund v Linden*, 40 N.J.Eq. 27. The lien of the bonds attached prior to the taking by the Government and the situation is not comparable to an instance of general taxes levied against Government-owned land, as the Circuit Court reasoned (R. 222).

In the case of Kadow v Paul, 274 U. S. 175, 47 S. Ct. 561, this court had occasion to consider a similar improvement district and an analogous reassessment statute. The following extracts are quoted therefrom:

"The cost of the improvement is to be paid by assessment upon the property benefitted, and **all the lands included within the boundaries of the district and assessed for the improvement are to remain liable for the costs of the improvement until the same are fully paid.** (p.177)

"* * * it is said that the bonds in question, the issuing of which the plaintiffs in error are seeking to have enjoined, are to be sold under the provisions of this law with the reassessment feature as a part thereof and that they become at once a cloud upon the title of plaintiff, make it unmarketable * * * * (p. 179)

"Supplemental assessments in providing for the payment for such improvements are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost, and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement* * * *(Citing cases—p. 181)."

Among the cases cited in the latter opinion is that of Norris v Montezuma Valley Irr. Dist., 248 Fed. 369, wherein statutes substantially identical with those involved in the immediate cause were construed. The following extract from the latter case seems pertinent:

"In order to give to these statutes the construction contended for by defendants in error, it is necessary to read into them a provision that there shall be paid on the bonds only so much as the annual levy shall produce in money collected, whereas the **statute is peremptory that the bonds and interest shall be paid, and the remaining provi-**

> **sions only indicate the source and mode of obtaining the fund.** In order to give full force and effect to every portion of the statute there must not only be an assessment and levy, but the debt must be paid. A statutory obligation of a municipal corporation or quasi municipal corporation to pay its debts, or to fix a rate of levy necessary to provide the amount of money required to pay its debt is not satisfied by an assessment rate of levy sufficient to pay the debt if the taxes are collected, but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt. (citing cases)."

Petition for writ of certiorari in the latter cause was denied by this court,—248 U. S. 569, 63 L. Ed. 425. There are a number of decisions along the same general lines of the two foregoing cases,—12 C. J. 1265: Klemm v Davenport, 70 A. L. R. (Fla) 156, and cases therein cited.

The necessary conclusion to be drawn from the applicable statutes and pertinent decisions is that the petitioner's bonds, representing the "cost and expense" of the improvements, constituted a lien upon the property within the district, which lien is not released by the mere payment of the original assessment, but only when the bonds are fully paid. As this court stated, in the Kadow case, " * * * all the lands included within the boundaries of the district and assessed for the improvement are to **remain liable for the costs of the improvement until the same are fully paid.**" This is the spirit and intent of the statutes (especially § 4014), and, as said in the Norris case, "the remaining provisions only indicate the source

and mode of obtaining the fund." Under these statutes and decisions petitioner's bonds were actually liens upon the lands within the districts at the time such lands were taken by the Government for reservoir purposes. The fact that the Government had thorough knowledge of the entire situation at the time of the taking of the property and before the purchase price was paid to the land owners at least adds moral strength to petitioner's claim.

POINT D

PETITIONER'S PRIVATE PROPERTY (THE BONDS, SECURED OR UNSECURED) HAS BEEN "TAKEN" FOR A PUBLIC USE WITHOUT COMPENSATION BEING MADE THEREFOR, AND THE GOVERNMENT IS LIABLE UPON IMPLIED CONTRACT.

In presenting this phase of the case it would not seem necessary to determine whether petitioner's bonds, at the time of the taking by the government, were absolutely unsecured, or secured by "inchoate liens," or secured by actual liens upon the property within the respective districts. In either case the bonds were property in a constitutional sense, and if that "property" was taken from petitioner by the government in connection with the construction of the American Falls Reservoir, then "the government, by the very act of taking, impliedly has promised to make compensation because the dictates of justice and the terms of the 5th Amendment so required."

(United States v Cress, 243 U. S. 316, 329, 61 L. Ed. 746).

Petitioner has consistently contended, and now adheres to that contention, that the government has openly, intentionally, and completely "taken" petitioner's property. It is not a case of mere damage or injury to one's property, or a case involving only interference with property rights, or a question of degree. Valid and enforceable bonds have been completely confiscated and appropriated, and the only value which remains for petitioner to enjoy is the parchment fragments upon wihch the bonds are printed. Once valuable bonds are now mere shadows. The "taking" is complete and permanent. A study and comparison of precedents will substantiate petitioner's contention in this respect.

In the first place, it should probably be noted that there is no personal liability on the part of the municipality or any one else to pay these bonds. It is so provided by the bonds themselves (R.19), as well as by § 4026 I. C. S. (text of statute in app.), and such has been the universal holding of the courts. Moore v City of Nampa, 276 U. S. 536, 48 S. Ct. 340; Hughes v Village of Wendell, 275 Pac. (Idaho) 1116. As the Idaho court recently stated, "* * * the very apparent purpose of the section (No. 4026) was to relieve the municipality and the property owners from personal liability." Myers v City of Idaho Falls, 11 Pac. (2) 626, 632. In brief, the bondholders only remedy is

against the property in the particular improvement district. In the light of this rule, it must be readily conceded that when the government expropriated the lands within these improvement districts it simultaneously expropriated the outstanding and unpaid bonds theretofore issued against the property of such districts. When the government flooded the lands, definitely excluding and shutting off all title and claim of petitioner and every other private owner or encumbrancer upon said lands, it thereby, as a matter of law and fact, completely appropriated and took all the rights it had not already acquired by private dealings. Such flooding directly and naturally resulted in the complete appropriation of petitioner's property, and since it was for a public use and no compensation was paid petitioner, the result is an implied promise on the part of the government to pay petitioner.

The case of Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 68 L. Ed. 934, is analogous. There an incompleted ship and the owner's building contract thereon were taken for governmental uses, and this court held that the "direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder." A recovery for the value of the property at the time of the taking was allowed.

The Farbwerke case, quoted from on p. 26, supra,

holding a chose in action "property" and that the taking thereof creates a liability under the 5th Amendment, is also interesting at this point of the argument.

One of the leading cases upon this question is that of United States v Lynah, 188 U. S. 445, 47 L. Ed. 539. In the latter case, in connection with the improvement of navigation in the Savannah River, certain dams and obstructions were placed and maintained in the river bed, with the result that the raising of the water above its natural height backed the water against plaintiff's embankment upon the river, interferred with the drainage of his plantation, etc. This was held to be a taking of private property within the meaning of the 5th Amendment, requiring compensation to be paid by the government, notwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property overflowed. The court pointed out that this overflow was to such an extent as to "cause a total destruction of its value," and thereby the property was "in contemplation of law, taken and appropriated by the government." After discussing many authorities it was said (p. 470):

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th

> Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; * * *."

The only difference between the Lamb case and the immediate one is that the property taken in the Lamb case was the "use and value" of land, while in the immediate case the property taken is the "use and value" of lands. While petitioner retains in theory at least, the physical possession of the parchment formerly designated lands, yet the same is as worthless and as completely expropriated as though the same had been perpetually submerged along with the lands of the districts in question. The direct and immediate result of the government's actions was to deprive petitioner of every essential attribute and all value of its property.

Among the many other cases along these same general lines are the following: United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 Law Ed. 846; Bowers v. Bloomfield, 86 Atl. 428, 43 L. R. A. N. S. 451; United States v. Cress, 243 U. S. 316, 61 Law Ed. 746; Pumpelly v. Green Bay & M. C. Co., 13 Wall. 166, 20 Law Ed. 557; Snowden v. Port Lavaca Canal Co., 238 Fed. 430; Tucker v. United States, 285 Fed. 428; Knowles v. New Sweden Irr. Dist., 101 Pac. (Idaho) 81; and Morrison v. Clackamas County (Ore.),

(9 Pac (2) 811. In the latter case the court was interpreting a section of the Oregon constitution (for full text see app p 581) corresponding to the portion of the 5th Amendment under consideration. In the Oregon case, as part of a highway, the county built a bridge and jetty in such manner as to change the current from its former course and throw it against plaintiff's land, with the result that the soil and improvements were washed from plaintiff's land and it was "rendered utterly valueless". Among other things the court said:

> "(2) According to the more modern authorities, any destruction, restriction, or interruption of the common and necessary use and enjoyment of the property of a person for a public purpose constitutes a "taking" thereof (citing cases) * * *
>
> "(4) It is not necessary that the owner of property be actually dispossessed or that the property be completely destroyed in order to constitute a taking within the meaning of the constitutional provisions. U. S. v Cress, 243 U. S. 316 * * *."

When the law, which the foregoing authorities show to be plainly established, is applied to the facts before the court, it must be concluded that petitioner's property has been "taken" in a constitutional sense, and that a recovery should be allowed.

POINT II

PETITIONER'S PROPERTY WAS NOT TAKEN UNTIL THE RESERVOIR SITE WAS ACTUALLY FLOODED IN 1957, HENCE THE SUIT FILED IN 1959 WAS WITHIN THE SIX YEAR PERIOD FIXED BY THE TUCKER ACT

The conclusions of the trial court and the Circuit Court upon the question of the statute of limitations are set out in the order named, to wit:

> " * * * the statute of limitations does not begin to run **until the defendant actually takes the property** and not from the date of the deeds conveying it and that is true in these cases when we consider the provisions in the deeds from the property owners to the United States wherein it is provided that

> 'Vendor retains possession of all the buildings and improvements on the above described land, and agrees to remove the same to land outside of the American Falls Reservoir site by January 1, 1957.' " (R 199)

> "Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose. The suit is too late and the District Court had no jurisdiction thereof under the Tucker Act." (R 233)

Apparently the Circuit Court concluded that when the government contracted with the individual owners of the various lots in the improvement districts for the purchase of such property for the reservoir site, and the property was later deeded to the government in conformity with such contracts, and later flooded with the waters

of the reservoir, the date of the contracts, and not the date of the flooding, fixed the date of the "taking" of petitioner's property. This reasoning might be acceptable if petitioner had been a party to such contracts and conveyances, or a party to such condemnation proceedings as were had. Petitioner was not a party to the contracts (R. 111 & def't's ex. 1), nor was it a party to any condemnation proceedings (R. 11). Therefore the purchases made by the government had no influence whatever upon petitioner's property and property rights. When the government acquires property by private purchases from the land owners the legal force and effect of such purchases are the same as those between normal citizens. Such purchases and the sequent conveyances did not disturb the rights in the property sold and conveyed then held by those not parties to the contracts and conveyances. The property rights of such third parties remained just as though the property had continued in the ownership and possession of the individual owners, that is, they so continued until the government actually took physical control and possession of the property to the exclusion of all claimants. The following provision in the contracts of purchase between the government and the individual owners conclusively establishes the fact that the Government was not even attempting to acquire more than the land owners' interest and fully recognized the rights of others:

> "7. Liens or encumbrances existing against said property may, at the option of the United States, be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved, * * *"

Acting under this authority, the Government withheld sufficient money to pay petitioner's bonds from "a very great number" of the land owners (R. 124). The total so withheld was "from $13,000 to $14,000" (R. 134), an amount far in excess of petitioner's claim as allowed by the trial court, the judgment in the immediate action being for the principal sum of $8,104.79 (R. 78), while the judgment in the companion case, not before this court, was only for the sum of $388.48 (U. S. v J. K. Mullen Inv. Co., 63 Fed. (2) 56). In brief, when the Government bought this property, it only acquired the bare legal title, and agreed that the vendor retain title to the improvements, which improvements such vendor must remove from the premises not later than January 1, 1927 (R. 199), or such earlier time as the same might be needed for reservoir purposes. And the Government also had the option of retaining portions of the sales prices for the purpose of discharging any liens or encumbrances existing against the property. The whole matter is summarized in the trial court's 25th finding (R. 76) in these words:

> "* * * the defendant acquired all of the property within the limits of districts 1, 2, and 8 for the reservoir purposes only, in some instances by condem-

> nation proceedings, to which the plaintiff or its predecessor in interest was not made a party, but mainly by deeds from the record owners in various and divers times between 1920 and January 1, 1927; but that the former record owners thereof retained the right of possession until January 1, 1927, and that the property was taken for a public purpose, that is to say, for the reservoir purpose, and flooded it on or shortly after January 1, 1927."

Thus, when the Government entered into these various contracts of purchase with the individual owners, it did not then acquire, or pretend to acquire, the full title, but it allowed the owners to continue to use and enjoy the property and to remove all improvements therefrom, and it fully recognized liens or encumbrances existing against said property. Surely the mere execution of contracts of such limited scope and effect did not amount to such a "taking" as would start the statute of limitation running. How can it be said that the Government took petitioner's property so long as it was recognizing petitioner's rights as a bondholder and actually retaining the land owners' money for the avowed purpose of paying petitioner's claim? The Government actually retained more than ample money for this specific purpose "until some time in 1929 before they paid it to the land owners" (R. 134).

Under such conditions there was no "taking" of petitioner's property as a matter of law. Petitioner's property was not taken until the Government actually possess-

ed the property to the exclusion of all others. This was done when, and only when, the rising waters of the reservoir forced all off the reservoir site and thereby effected absolute possession of the full title and possession on behalf of the Government in a manner hostile to, and inconsistent with, any recognition of petitioner's rights and property. In other words, the Government's contracts and deeds were not inconsistent with full recognition of petitioner's rights, because it had authority to, and did, retain enough money from the land owners to pay petitioner in full, but its refusal to pay this retained money to petitioner, coupled with the permanent and complete flooding of the land, were hostile to any claim of petitioner and constituted a constitutional taking. This "taking" occurred "on or shortly after January 1, 1927 (R. 76), and since the suit was filed Nov. 25, 1929 (R. 7), it was instituted well within the six year period fixed by the Tucker Act, and the Circuit Court erred in concluding that the "suit is too late" (R. 233).

The law applicable to this situation has been forcefully and briefly stated by this court in the case of Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267, in these words:

> "The Fifth Amendment does not entitle him to be paid in advance of the taking."

POINT E.

THE STATUTE OF LIMITATIONS IS AN AFFIRMATIVE DEFENSE AND THE ONE ASSERTING IT MUST PROVE EVERY ESSENTIAL ELEMENT. THE GOVERNMENT HAS NOT ESTABLISHED THE DATES OF THE RESPECTIVE PURCHASES FROM THE LAND OWNERS, AND IT CANNOT BE DETERMINED THAT THE IMMEDIATE SUIT WAS FILED TOO LATE, UPON ANY THEORY.

The only evidence in the record as to the dates upon which the government contracted with the individual owners for the purchase of their property is defendant's exhibit one, showing that the Dahlen property was purchased Dec. 9, 1925 (R.144), and the testimony of the government's witnesses, which may be summarized in the following statement of witness Bohlson:

> "I could not say that the bulk of the purchases were after 1925 but we started in 1920 and got through in about 1926." (R.135).

Thus, it is reasonable to assume that some of the contracts were executed more than six years before the institution of the immediate action, but is is not fair or reasonable to assume, and it cannot be known, that any substantial number thereof were executed more than six years before the action was started.

The applicable law is thus stated in the Idaho case of Johnston v Keefer, 280 Pac. 324, 326:

> "The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it." (citing cases)

As shown in 37 C. J. 1243, note 59, and 17 R. C. L. 1004, this is the majority rule. This seems to be the rule in the federal courts also. In the case of Jackson v United States, 24 Fed. (2) 981, 986, it was held that this rule is enforceable as against the United States government. The latter case was reversed upon another feature of the case by the Tenth Circuit Court (United States v Jackson, 31 Fed. (2) 241), and as so modified the decision was approved by this court (Jackson v United States, 281 U. S. 344, 50 S. Ct. 294). A more pertinent case is that of Borland v Haven, 37 Fed. 394, from which case we quote the following, found on p. 413 of the opinion:

> "Besides the defense (of limitations) is an affirmative one, set up by the defendants themselves, and it devolves upon them to show, affirmatively, that the bar has attached, and to what part. Now, **it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid.** The defense, therefore, on both grounds must be overruled."

An appeal to this court from the latter decision was dismissed (Haven v Borland, 159 U. S. 255, 40 L. Ed. 140). When it is borne in mind that the evidence in the immediate action does not reveal how many of the contracts of purchase were executed more than six years before the in-

stitution of the suit, the above quotation becomes particularly interesting and pertinent.

Under this generally recognized rule, the plea of the statute of limitations cannot be sustained in the immediate cause, even though it be conceded that the Circuit Court is right in holding that petitioner's right of action accrued when the government entered into such contracts of purchase, because the evidence completely fails to show how many of the contracts were executed more than six years before the filing of suit. The government has utterly failed to submit evidence to support its own affirmative plea and the same cannot be sustained.

CONCLUSION

In view of the foregoing facts and authorities, it is respectfully submitted that the record presents a cause calling for the exercise of this Court's supervisory powers, in order that the decision in this cause may be harmonized with the decisions of other Circuit Courts of Appeals and with applicable decisions of this Court, and that to such ends a writ of certiorari should be granted, and that this Court should review and reverse the decision of the Circuit Court of Appeals in this cause.

Dated at Gooding, Idaho, April 18th, 1933.

Respectfully submitted,

W. G. BISSELL
BRANCH BIRD
Attorneys for Petitioner.

"§ 4005. **Ordinance creating improvement district.** By the provisions of such ordinance a local improvement district shall be established, to be called "Local improvement district No. ....," which shall include all the property fronting or abutting on, contiguous or tributary to the street to be improved, between the points named in such resolution or ordinance to the distance back from such street, if platted in blocks to the center of the block; if platted in lots to the center of the lots; and if not platted, to the distance of 125 feet.

"Such ordinance shall provide that such improvements shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, or abutting, contiguous or tributary thereto, and included in said improvement district and in proportion to the benefits derived by said improvement: Provided, That the city council or trustees may expend from the general fund for such purposes such sums as, in their judgment, may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvement. ('17, c. 22, § 1, part of subd. 2238f4, p. 53.)"

"§4007. **Lien of assessments: Foreclosure.** Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.

"Such suit shall be in the name of the city of ..... (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that

the work has been done or material furnished, which, according to the true intent of this article, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers (1911 c 97, § 2, part of subd 2, p 99).

"§ 4013. **Special assessments for improvements—Collection.** All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes (1911 c 139, § 5).

"§ 4014. **Issuance of bonds to cover instalment payments.** Whenever the mayor and council or trustees of any municipality shall, under authority vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be sidewalked, graded, curbed, planked, gravelled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 and 3944, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue in the name of the municipality, improvement bonds

of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed 10 years from and after the date of issue of such bonds, and shall bear interest not exceeding 7 per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees. Provided, however, That when such bonds are issued for further, separate or additional improvement by paving street or streets, or highways that have theretofore been graded, curbed, or graveled only, under the provisions of this chapter, **then such bonds shall be a subsequent lien upon the property subject to assessment for such improvement, to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement of grading, curbing, or graveling of such street or streets or highway.** Provided further, That the grading, curbing, or graveling of street, streets, or highways, only and thereafter the paving of said street, streets or highways as shall have theretofore been graded, curbed, or graveled, as allowed and contemplated by provisions of this chapter, shall not be construed or understood as one of the same improvement, or for the same purpose or for one or the same benefit, or as a double assessment for improvements against the property to be assessed for the payment of the costs and expenses of such improvement, but shall be considered and construed as separate, distinct, single and independent improvements and benefits, to such street, streets, or highways and the property assessed for the payment of the costs and expenses there-

of. And all assessments levied or bonds issued for the payment of either or each of such improvements, shall be considered and construed as assessments levied or bonds issued for separate, distinct, single, and independent improvements and benefits on and to such street, or streets, or highways, and the property assessed for the costs and expenses of such improvement. ('19, c. 76, § 3, p. 276.)"

"§ 4023. **Bondholders' rights and remedies.** Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this article in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

"And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such asessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, **in addition to the amount of such bonds and interest thereon,** 5 per centum, together with costs of such suit including a reasonable sum for attorney's fees.

"Any number of the holders of such bonds for any

single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

"And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land. (C. L. 152:95.)"

"§ 4026. **Municipality not liable.** The holder of any bond issued under the authority of this article shall have no claim therefor against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but his remedy, in case of nonpayment, shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued. (C. L. 152:98.)"

Art. I, sec. 18, Constitution of Oregon:

"§ 18. PRIVATE PROPERTY TAKING FOR PUBLIC USE — COMPENSATION — CERTAIN USES DECLARED PUBLIC USES. — Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 903

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court overruling a demurrer to the complaint is reported in 40 F. (2d) 937. Its opinion on the merits (R. 196–200) is not reported. The opinion of the Circuit Court of Appeals (R. 207–234) is reported in 63 F. (2d) 48.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 23, 1933 (R. 234–235). A petition for rehearing was denied March 21, 1933 (R. 235). The petition for certiorari was filed

April 24, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Petitioner owned sidewalk and sewerage disposal construction bonds issued by an Idaho municipal corporation, which were to be paid only out of pro rata assessments against the respective properties benefited. The question presented is whether petitioner may recover under the Tucker Act from the United States amounts due on the bonds not included, through error, in the original assessment and not assessed until after the United States had purchased the properties in question for use in the construction of a reclamation dam.

2. Whether, if petitioner had a cause of action on the merits, this suit was barred by limitations applicable to suits under the Tucker Act.

STATUTES INVOLVED

The applicable provisions of the Idaho statutes are set forth in the Appendix (*infra,* pp. 13–25).

STATEMENT

Petitioner brought suit under the Tucker Act against the United States in the United States District Court for the District of Idaho to recover the unpaid balance of the principal and interest on sewage disposal and sidewalk construction bonds issued by American Falls, a municipal corporation

of Idaho (R. 7–31). Judgment was given for petitioner (R. 78–79). Upon appeal the Circuit Court of Appeals for the Ninth Circuit reversed, with instructions to dismiss the action because of lack of jurisdiction (R. 234–235).

The District Court made the following findings of fact (R. 59–76):

Petitioner is a Colorado corporation (R. 59), and the claim it sets up in the present suit is based upon an implied contract and is for an amount less than $10,000 (R. 60). On February 23, 1915, American Falls, a municipal corporation of Idaho, enacted an ordinance of intention to organize a sewerage district to be known as Local Sewerage Improvement District No. 1, to construct sewerage and disposal works in the district, and to issue bonds for the payment of the cost thereof. In accordance with this ordinance, a second ordinance was enacted creating and establishing such a district, providing for the construction of the sewerage system and the assessment of its cost against the property in the district (R. 60). The assessments provided for in the ordinance were levied and an assessment roll setting forth the necessary details was certified to and filed (R. 60–61). On July 6, 1915, a third ordinance was enacted approving and confirming the assessments as set forth in the assessment roll and providing for the payment of the assessments in ten equal installments, with interest (R. 61).

After other ordinances containing minor amendments were passed, an ordinance was enacted on

October 7, 1915, authorizing and providing for the issuance and sale of sewerage improvement bonds totaling $24,000 to provide funds for the construction of the system (R. 61–62). This ordinance also provided for levying and collection of special assessments which were thought sufficient to pay the principal and interest of these bonds in accordance with their provisions, but through mistake or inadvertence these assessments were not in fact sufficient to meet the payments (R. 62). Twenty-four bonds, each for a face amount of $1,000, with interest payable semiannually at the rate of seven per centum per annum, were issued (R. 62). Upon their issuance J. K. Mullen purchased all the bonds for their face value (R. 62–63). In 1925 Mullen transferred four of the bonds to petitioner, which it now owns. No amounts have been paid on the bonds and there is now due upon their principal $4,000, with interest from April 28, 1927 (R. 63). The form of the bonds is set out in paragraph 8 of the second amended complaint (R. 17–20, 63).

In 1916 American Falls created a second sewerage improvement district known as District No. 2 and issued bonds for this district in the amount of $7,150 for the construction of a sewerage system within the district in the same manner as the bonds for District No. 1 were issued (R. 63–64). The assessments made to pay the bonds for District No. 2 were through mistake or inadvertence not sufficient to pay the principal and interest (R. 65).

J. K. Mullen acquired all of the bonds issued for District No. 2 and transferred to petitioner four of these bonds, on which there is now due and unpaid $1,351.11, with interest from October 25, 1929 (R. 65–66). These bonds were identical in form and substance with the bonds of District No. 1 (R. 66).

During 1916 American Falls also established Local Improvement District No. 8 for the construction of cement sidewalks within portions of this district, and it issued bonds in a manner similar to that for Districts Nos. 1 and 2 to pay for this construction (R. 66–67). As in the case of Districts Nos. 1 and 2, the assessments to pay the bonds of District No. 8, were, through mistake or inadvertence, not sufficient to pay the principal and interest of the bonds (R. 67–68). J. K. Mullen purchased the entire issue of the bonds for this district, and in 1925 transferred to petitioner six of these bonds (R. 68). There is now due $3,000 on these bonds, together with interest from March 18, 1928 (R. 68–69). These bonds were in form and substance similar to those issued for the other districts (R. 69).

Because through error the original assessments were not sufficient to pay the principal and interest on the above-mentioned bonds for the three districts, ordinances were passed on July 3, 1928, providing for reassessments upon all the property in the three districts in order to take care of the amounts not paid on these bonds (R. 69–70).

Under the terms of the bonds and the statutes of Idaho, the only method of collecting the amounts due on the bonds was by the levy and collection of special assessments upon the property within the respective districts (R. 70), and by statutory provisions American Falls was not liable on the bonds, its only obligation being to collect the assessments (R. 71).

The United States acquired all the property within the three districts by condemnation proceedings (to which petitioner was not a party) or voluntary conveyance between 1920 and January 1, 1927 (R. 76). The owners retained possession until about January 1, 1927 (R. 76), when the United States, acting under authority of Congress and through its Department of the Interior and United States Reclamation Service, took possession of all the real property as a site for a reclamation storage reservoir, permanently flooding all of the property (R. 71–72). By this action petitioner's only remedy for collection of the amounts due on its bonds was destroyed (R. 72). The United States was aware of the situation in regard to petitioner's bonds and at the time it acquired the property it temporarily withheld $14,000 of the purchase price to be paid for the property in question (R. 73).

At the time the instant suit was filed there was due on petitioner's bonds $9,547.33 (R. 73). Previous to this time payments had been made by the

owners of the affected land to the City of American Falls on the bonds, which amounts were on deposit in a bank at the time of its failure, part of this sum having been collected from the bank and applied to payment on the bonds in question (R. 73–74). By allowing a credit for these payments the net amount due petitioner on the bonds was $8,104.79 (R. 74).

At the time the United States took the property in question it paid the amounts due under the original assessments, thereby discharging the liens for these sums. However, it did not pay the difference between the sum of the original assessments and the total amounts due on the bonds (R. 74).

The United States excepted to the findings of fact made by the court because not supported by the evidence and because improper evidence was admitted upon which the findings were based (R. 140), and it made a motion to correct the findings of fact, which was denied by the court, and an exception taken by the United States (R. 141, 149–156).

ARGUMENT

I

It is clear from the statutory provisions and the terms of the bonds that petitioner's remedy to secure payment on the bonds is confined to the enforcement of the assessments levied against the

property in the district.* And when the proportionate cost of improvement has been assessed.

*The bonds upon which petitioner's claim is based were authorized by statutes of Idaho to be issued for sidewalks and sewerage construction work. These statutes have been made a part of the Idaho Code Annotated, 1932 official edition, as chapters 27 and 28, dealing respectively with local improvement districts organized prior to March 15, 1927, and with sewer construction. Chapter 29 of this Code provides for instalment payment of improvement assessments. Section 49-2709 I.C.A. (*infra*, p. 14) provides that an amount assessed on any land for improvement construction work shall become a lien upon the land. Section 49-2716 I.C.A. (*infra*, p. 18) provides for the issuance of bonds to cover the cost of improvement construction. Section 49-2715 I.C.A. provides that an authorized officer of a municipal corporation shall levy assessments each year sufficient to meet payments on the bonds. Section 49-2721 provides that the owner of any piece of property liable for any special assessment may redeem his property by paying the entire assessment chargeable against the property and that when it has been so redeemed it shall not be thereafter liable for further assessments for the cost of the particular improvement. Section 49-2725 I.C.A. (*infra*, p. 22) sets forth the bondholders' rights and remedies, assigning to them the liens on the property created by the assessment. Section 49-2726 I.C.A. (*infra*, p. 23) provides that whenever, because of mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of the improvement made, the authorized officers of the municipal corporation shall make reassessments on all the property in the improvement district sufficient to pay for the improvement. Section 49-2728 I.C.A. provides that a municipality which has issued an improvement bond shall not be liable to the bondholder except for the collection of assessments. The bondholders' remedy in case of nonpayment is to be confined to the enforcement of the assessments.

The provisions dealing with the issuance of sewage disposal bonds are similar to those for improvement construction work. See 49-2813, 49-2820, 49-2821, 49-2822, 49-2826, 49-2829, 49-2830, and 49-2831.

against a particular piece of property the amount of this assessment and that amount only constitutes a lien upon the property, which is discharged by the payment of the assessment or by foreclosure of the property. *New First National Bank* v. *Weiser*, 30 Idaho 15.

The Idaho statutes give a lien against the property affected only in the event that there has been an assessment against the property. The bonds constitute a lien against the property taken only to the extent of the amount assessed. *Heine* v. *Commissioners*, 19 Wall. 655, 659; *Lyon* v. *Alley*, 130 U.S. 177, 180. It is admitted in the instant case that at the time the United States took the property in question the full amount of the original assessments had been paid, and accordingly all liens arising by virtue of this assessment had been discharged. Petitioner contends that the property was also subjected to liens for the balance of the amount of the face of the bonds not covered by the original assessment.

In view of the fact that no assessment for this balance had been made at the time the United States took the property, a necessary condition precedent under the Idaho statutes to a lien for this amount had not occurred. Accordingly, we believe that petitioner had no interest in the property when it was taken by the United States, and consequently has no right to recover under the Tucker Act against the United States. The State statutes were, of course, ineffective to confer any

right of lien against the property after the acquisition by the United States, when the liens had not theretofore been perfected.

Petitioner also contends that, since the United States extinguished the only means by which payment could be made, this constituted a taking of the bonds for which just compensation should be paid. The United States took only the land, and no one who did not have a specific interest in the land at the time of its taking is entitled to compensation because of the taking. Petitioner apparently suffers solely because of the error of the municipal authorities when the bonds were first issued. The fact that the United States knew that a balance was due on the bonds which could only be collected from the land in question was not important. The United States was not a party to the bonds and the bondholders had no definite interest in the property at the time of its taking by the United States. The United States did not appropriate to itself any rights under the bonds, and so there has not been a taking for which just compensation must be paid under the Fifth Amendment. *Omnia Commercial Co.* v. *United States*, 261 U.S. 502.

II

The present suit has been brought under the Tucker Act against the United States, and, since the sovereign may be sued only with its consent and only upon full compliance with the conditions

of this consent, there was no jurisdiction to entertain the present suit unless compliance with these conditions was affirmatively shown. The provision in the Tucker Act that suit must be brought within six years is unlike the ordinary statute of limitations, being a jurisdictional requirement. Accordingly, the burden is upon petitioner to show affirmatively this fact. *Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053 (C.C.A. 2d). The burden is not upon the United States to plead this limitation as a defense. *Carpenter* v. *United States,* 56 F. (2d) 828 (C.C.A. 2d).

The findings of fact show that the United States acquired the property in question, in some instances by condemnation proceedings but mainly by deed from the record owners, at various times between 1920 and January 1, 1927 (R. 76). It is clear that whenever these purchases were made the United States had taken the property so acquired even though in some instances the previous owners had been allowed to retain possession for a time. The petition was filed November 25, 1929 (R. 7). Upon this state of the record it does not affirmatively appear that all or any particular piece of the property in question had been taken within the six years immediately preceding the filing of the suit, because some of the property was acquired as early as 1920. Accordingly, petitioner, not having made a showing of necessary jurisdictional facts, is not entitled to maintain this suit under the Tucker Act.

The instant case involves a construction of the applicable statutory provisions of Idaho as applied to the particular bonds in question. Similar questions from other States would depend upon other local statutes. Any suit involving Idaho bonds very probably would arise in the Ninth Circuit and accordingly be governed by the decision of the court below. Under these circumstances the questions presented do not seem to be of general importance to the country as a whole.

CONCLUSION

The decision of the court below involved the construction of State statutes and their application to particular facts. It appears to be correct. The case does not seem to present questions of general importance. The petition should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
WILLIAM W. SCOTT,
WILLIAM H. RILEY, JR.,
W. S. WARD,
Attorneys.

MAY 1933.

APPENDIX

IDAHO CODE ANNOTATED, 1932 OFFICIAL EDITION

SECTION 56-602 (I.C.S. § 71 [28]). *Consent to purchases by United States.*—Consent is given to any purchase already made, or that may hereafter be made, by the government of the United States, of any lots, or tracts of land, within this state, for the use of such government, and to erect thereon and use such buildings, or other improvements, as may be deemed necessary by said government; and over such lands and the buildings, or improvements, that are, or may be, erected thereon, the said government shall have entire control and jurisdiction, except that the state shall have jurisdiction to execute thereon all process, civil or criminal, lawfully issued by the courts of this state, and not incompatible with this cession.

SECTION 49-2702 (I.C.S. § 4000). *Bases of assessments.*—The assessment of the cost and expense of any work or improvement provided for in sections 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code shall be assessed upon the abutting, contiguous and tributary lots and lands, and lots and lands included in the improvement district formed, each lot and parcel of land being separately assessed for the full debt thereof in proportion to the number of feet of such lands and lots fronting thereon or included in the improvement district, and in proportion to the benefits derived to such property by said improvement suf-

ficient to cover the total cost and expense of the work to the center of the street.

SECTION 49-2707 (I.C.S. § 4005). *Ordinance creating improvement district.*—By the provisions of such ordinance a local improvement district shall be established, to be called "Local improvement district No. —", which shall include all the property fronting or abutting on, contiguous or tributary to the street to be improved, between the points named in such resolution or ordinance to the distance back from such street, if platted in blocks to the center of the block; if platted in lots to the center of the lots; and if not platted, to the distance of 125 feet.

Such ordinance shall provide that such improvements shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, or abutting, contiguous or tributary thereto, and included in said improvement district and in proportion to the benefits derived by said improvement: *Provided*, That the city council or trustees may expend from the general fund for such purposes such sums as, in their judgment, may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvement.

SECTION 49-2709 (I.C.S. § 4007). *Lien of assessments: Foreclosure.*—Whenever any expense of cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accord-

ance with the provisions of the Code of Civil Procedure.

Such suit shall be in the name of the city of ——— (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers.

SECTION 49-2710 (I.C.S. § 4008). *Assessment roll.*—Upon the passage of an ordinance as herein provided, or at such later time as the council or board of the trustees may determine, the committee on streets, together with the city engineer, or other proper authority of such municipality, shall make out an assessment roll according to the provisions of said ordinance and shall certify the same to the council or trustees of such municipality.

SECTION 49-2711 (I.C.S. § 4009). *Notice of filing roll: Time to file objections.*—Upon receiving the said assessment roll the clerk of the municipality shall give notice by three successive publications in the official newspaper of such municipality that such assessment roll is on file in his office, the date of filing the same, and said notice shall state a time at which the council or trustees will hear and consider objections to said assessment roll by the

parties aggrieved by such assessments. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may, within 10 days from the last publication provided herein, file with the clerk his objections, in writing, to said assessment.

SECTION 49-2712 (I.C.S. § 4010). *Hearing objections: Order thereon.*—At the time appointed for hearing objections to such assessment, the council or trustees shall hear and determine all objections whch have been filed by any party interested to the regularity of the proceedings in making such assessment, and the correctness of such assessment, or of the amount levied on any particular lot or parcel of land, and the council or trustees shall have the power to adjourn such hearing from time to time and shall have power, in their discretion, to revise, correct, confirm or set aside such assessment and to order that such assessment be made de novo and such council or trustees shall pass an order approving and confirming such assessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said assessment to the amount thereof levied on each lot and parcel of land.

SECTION 49-2713 (I.C.S. § 4011). *Appeal from order.*—Any person who has filed objections to such assessment or reassessment as hereinbefore provided shall have the right to appeal to the district court of the state and county in which said municipality may be situated.

Such appeal shall be taken by filing a written notice of appeal with the clerk of such municipality within 10 days after such assessment or reas-

sessment roll shall have been approved and confirmed by the council or trustees, and said notice shall describe the property and the objections of such appellant to such assessment, and such appellant shall also file with the clerk of the district court aforesaid, within 20 days from the approval and confirmation of such roll by the council or trustees, a copy of said notice of appeal, assessment or reassessment roll and proceedings thereof, certified by the clerk of such municipality, together with a bond to such municipality, conditioned to pay all costs that may be awarded against the appellant in such sum not less than $200 and with such security as shall be approved by the judge of said court.

SECTION 49-2714 (I.C.S. § 4012), *Trial of appeal.*—The case shall be docketed by the clerk of said court in the name of the person taking the appeal against the municipality as "An appeal from assessments." Said cause shall then be at issue and have precedence over all civil cases pending in said court, except proceedings under the act relating to eminent domain by cities and villages, actions of forcible entry and detainer. Such appeal shall be tried in said court as in the case of equitable causes, except that no pleadings shall be necessary. The judgment of the court shall be either to confirm, modify or annul the assessment in so far as the same affects the property of the appellant, from which judgment an appeal shall lie to the Supreme Court, as in other causes. In case the assessment is confirmed, the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs.

SECTION 49-2715 (I.C.S. § 4013). *Special assessments for improvements: Collection.*—All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.

SECTION 49-2716 (I.C.S. § 4014). *Bonds issuance to cover instalment payments.*—Whenever the mayor and council or trustees of any municipality shall, under authority vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be sidewalked, graded, curbed, planked, graveled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed 10 years from and after the date of issue of such bonds, and shall bear interest not ex-

ceeding 7 per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees: *Provided, however,* That when such bonds are issued for further, separate, or additional improvement by paving street or streets, or highways that have theretofore been graded, curbed, or graveled only, under the provisions of this chapter, then such bonds shall be a subsequent lien upon the property subject to assessment for such improvement, to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement of grading, curbing, or graveling of such street or streets or highway: *Provided further,* That the grading, curbing, or graveling of street, streets, or highways, only and thereafter the paving of said street, streets or highways as shall have theretofore been graded, curbed, or graveled, as allowed and contemplated by provisions of this chapter, shall not be construed or understood as one of the same improvement, or for the same purpose or for one or the same benefit, or as a double assessment for improvements against the property to be assessed for the payment of the costs and expenses of such improvement, but shall be considered and construed as separate, distinct, single, and independent improvements and benefits, to such street, streets, or highways and the property assessed for the payment of the costs and expenses thereof. And all assessments levied or bonds issued for the payment of either or each of such improvements, shall be considered and construed as assessments levied or bonds issued for separate, distinct, single, and

independent improvements and benefits on and to such street, or streets, or highways, and the property assessed for the costs and expenses of such improvement.

SECTION 49-2717 (I.C.S. § 4015). *Disposal of bonds—Interim warrants.*—Such bonds may be issued to the contractor constructing the improvement in payment thereof, or the mayor or council or trustees or other authorized officers of said municipality may sell the same at not less than their par value net, and pay the proceeds thereof to the contractor. If the council or trustees shall determine to issue and sell said bonds, they may, for the purpose of meeting the expense of making said improvements as the same are installed prior to the sale of said bonds, issue warrants against the improvement district, payable to the contractor or other proper person, upon estimates of the city or village engineer, bearing interest at the rate of not to exceed 7 per cent per annum, which warrants, together with the interest due thereon at the date of the issuance of said bonds, shall be redeemed and retired by the proceeds of the sale of said bonds.

SECTION 49-2718 (I.C.S. § 4016). *Maximum bond issue—Interest coupons.*—Such bonds shall not be issued in excess of the contract price and expense of such improvement, including engineering and other clerical service, advertising, cost of inspection, cost of collecting assessments, and interest upon warrants, if issued as aforesaid, and the instalment coupons shall include annual interest on such instalments to the maturity thereof. The bonds shall be of such denomination as the council or trustees shall deem proper.

SECTION 49-2720 (I.C.S. § 4018). *Form of bonds.*—Such bonds shall be numbered from one upward, consecutively, and each bond and coupon shall be signed by the mayor, or the chairman of the board of trustees, countersigned by the city or village treasurer, and attested by the clerk of such municipality: *Provided, however,* That such coupons may, in lieu of being signed have printed thereon the facsimile of the signature of said officers, and each bond shall have the seal of such municipality affixed thereto, and shall refer to the improvement district for the payment of which the same shall be issued. Each bond shall provide that the principal sum therein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise.

SECTION 49-2721 (I.C.S. § 4019). *Payment of instalments by owner.*—The owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his propert, upon the municipal clerk having published a printed notice in the official newspaper of the municipality for 10 consecutive days, or three consecutive weekly issues, which notice shall state the time for payment to begin and the time for payment to close, the last day of said notice to be not less than 30 days before the issuance of the bonds, or, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of the unlevied instalments with interest on the latter at the rate provided in the bonds from the date of the issuance of the bonds to the time of the maturity of the last

instalment. In all cases where instalments of the assessments are not yet levied and paid as above provided, whether before or after the issuance of the bonds, the same shall be paid to the clerk, who shall receipt therefor, and all sums so paid shall be applied solely to the payment of the cost and expense of such improvements or the redemption of the bonds issued therefor.

When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvements except as hereinafter provided.

SECTION 49–2725 (I.C.S. § 4023). *Bondholders' rights and remedies.*—Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this article in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for, and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to

collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, 5 per cent, together with costs of such suit including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land.

SECTION 49-2726 (I.C.S. § 4024). *Reassessment of benefits.*—In all cases of special assessments for local improvements of any kind against any property, persons or corporations whatsoever, wherein said assessments have failed to be valid in whole or in part for want of form or sufficiency, informality, irregularity or nonconformance with the charter provisions or laws governing such assessments, the city council or trustees or other authorized board or body shall be, and they are hereby, authorized to reassess such special taxes or assessments and to enforce their collection, in accordance with the provisions of law existing at the time the reassessment is made.

Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful,

and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy.

SECTION 49-2727 (I.C.S. § 4025). *Application of bonding provisions.*—Nothing shall be construed as repealing or modifying any existing manner and method for cities of the first class, or those organized under special or local laws, to make improvements as hereinbefore provided for, but shall be construed as an additional and concurrent power and authority. Any city whose charter provides for the issuance of bonds for local improvements, payable only from the proceeds of special assessments, is hereby authorized to issue such bonds in the manner and with the effect provided in this chapter, and the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond.

SECTIONS 49-2801 to 49-2831 (I.C.S. §§ 4121–4151) relate to sewer improvements and are to similar effect as the sections set out above.

SECTION 49–2821 (I.C.S. § 4141) provides for reassessments as to sewerage improvements, and is as follows:

> In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregu-

larity, or nonconformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or board shall be, and they are hereby authorized to reassess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment was made.

Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 32

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, petitioner

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court overruling a demurrer to the complaint is reported in 40 F. (2d) 937. Its opinion on the merits (R. 124–128) is not reported. The opinion of the Circuit Court of Appeals (R. 135–162) is reported in 63 F. (2d) 48.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 23, 1933. (R. 162–163.) A petition for rehearing was denied March 21, 1933.

(R. 163.) The petition for certiorari was filed April 24, 1933, and was granted May 29, 1933, 289 U.S. 721. (R. 165.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner is the owner of certain bonds issued by an Idaho municipal corporation to pay the cost of sidewalk and sewerage improvements, which bonds by their terms; and by provisions of Idaho statutes are payable from a fund created by assessments against the land or lots benefited. Assessments calculated to pay in full the entire issue of the bonds and interest were duly levied against the properties subject thereto. Thereafter the United States acquired by purchase or condemnation, for a reclamation project, all the lands so assessed, and paid in full the assessments against them. These assessments proving inadequate, by reason of miscalculation and unforeseen contingencies, to pay in full the amounts due on the bonds, an attempted reassessment was made after the United States had acquired title to the lands to cover the unpaid amounts. The questions are:

1. Whether the District Court has jurisdiction under the Tucker Act of a suit against the United States for the amounts due on petitioner's bonds.

2. Whether the cause of action, if any, is barred by the six-year limitation of the Tucker Act.

3. Whether the right of action, if any, accrued to the petitioner.

STATUTES INVOLVED

The applicable provisions of the Idaho statutes are set forth in the Appendix, *infra*, pp. 20–32.

STATEMENT

The suit was filed in the District Court for the District of Idaho under the Tucker Act to recover amounts due on certain bonds held by the petitioner, a Colorado corporation, and issued by the Village of American Falls, Idaho, for the improvement of lots afterward acquired by the United States in connection with the construction of the American Falls Reservoir, under authority of the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388.

The District Court awarded judgment for the petitioner in an amount of $8,104.79 with costs. (R. 46.) This judgment was reversed by the Circuit Court of Appeals for the Ninth Circuit, with instructions to dismiss the petition for lack of jurisdiction. (R. 162–163.)

The District Court made findings of fact (R. 34–45) which may be summarized as follows:

The Village of American Falls, by appropriate resolutions and proceedings, created in 1915 Local Sewerage Improvement District No. 1 for the construction of sewers, and in 1916, Local Sewerage Improvement Districts Nos. 2 and 8, for the con-

struction of sewers and sidewalks, respectively, authorized the issue and sale of bonds to finance the work and levied assessments against the lots in these districts, calculated to pay in full the principal and interest of the bonds. (R. 35–36, 36–38, 38–40.) There is no question as to the regularity of these proceedings or the validity of these assessments, which are hereafter referred to as the original assessments.

District No. 1 issued 24 bonds, numbered from 1 to 24, inclusive, of $1,000.00 each, with interest at 7%, dated July 15, 1915, and payable on or before July 15, 1925 (R. 36); District No. 2 issued 15 bonds, numbered consecutively from 1 to 15, inclusive, the first 14 of which were in the amount of $500.00 each, and the fifteenth, in the amount of $150.00, with interest at 7%, dated August 1, 1916, and payable on or before August 1, 1926 (R. 37–38); District No. 8 issued 43 bonds numbered consecutively from 1 to 43, inclusive, in the amount of $500.00 each, with interest at 7%, dated September 14, 1916, and payable on or before September 1, 1926 (R. 39). The entire issues of the bonds of the three districts were purchased upon their issuance by one J. K. Mullen, who in 1925, gave and transferred to the petitioner, their present holder, the last four bonds of District No. 1, upon which there is due the principal sum of $4,000.00, with interest from April 28, 1927; the last four bonds of District No. 2, upon which there is due the amount of $1,351.11, with interest from October 25, 1929;

the last 6 bonds of District No. 8, upon which there is due the amount of $3,000.00, with interest from March 18, 1928. (R. 36, 38, 40.) All of these bonds were in identical form, and contained the following warranty, which differed in wording in the respective bonds of the three districts only in the name of the district (R. 8–9, 36, 38, 40):

> AND IT IS HEREBY CERTIFIED, RECITED AND WARRANTED, That said village is now and for some years past has been a village of said state, and body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho and the ordinances of said village to exist and to happen and be done and performed precedent to and in the creation of the said Local Sewerage Improvement District No. 1 and the construction of a sewerage system and sewerage disposal works therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said village, and payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvements have been duly levied and assessed as special assessments for sewerage improvements upon all of the lands, lots, and pieces and parcels of land in said Local Sewerage Improvement District No. 1, separately and in addition to all other taxes, and said special assessments are a lien upon

said lands, lots, and pieces and parcels of land, and take precedence of all other liens; that due provision has been made for the collection of said special assessments and for the levy and collection of a direct annual tax, sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity.

In conformity with Subdivision 15, Chapter 80 of said Session Laws of 1911, it is hereby recited that "the holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued, in any event, except for the collection of the special assessment made for the work of improvement for which said bond was issued, but this remedy, in case of nonpayment, shall be confined to the enforcement of said assessment. A copy of this subdivision shall be plainly written, printed, or engraved upon the face of each bond so issued".

During the period from 1920 to January 1, 1927, the United States acquired all the property within the three districts for the construction of a reservoir, some by condemnation proceedings to which the petitioner or its predecessor in interest was not made a party, but most of it by deeds from the record owners, who were permitted to retain possession until January 1, 1927, at which time, or shortly thereafter, the land was flooded. (R. 44–45.)

At the time of acquiring the property the United States paid or caused to be paid the original assess-

ments against it. (R. 43.) The original assessments, calculated when made to pay in full the principal amounts and interest of the bonds, proved insufficient to do so, according to the court's finding, "through mistake or inadvertence" (R. 36, 37, 39), and by ordinances enacted on July 3, 1928, followed by the prescribed statutory procedure, the City (formerly Village) of American Falls reassessed the property in the three districts for the deficiency. (R. 40–41.) These reassessments, however, according to the Findings, could afford petitioner no relief, and were made by the City in compliance with statutory mandate and for its own protection. (R. 41.)

The court further found that at the time the United States acquired the tracts of land within the three improvement districts, it was aware that the assessments originally made were insufficient to pay the bonds and interest and that it withheld until the institution of this suit a portion of the agreed purchase price for the purpose of protecting itself against the claim of the petitioner, which sum so withheld approximated $14,000 (Finding 20, R. 42–43).[1]

[1] The evidence in the "Bill of Exceptions" (R. 47–91) shows that this money was paid to the landowners before this suit was instituted and that the money was not withheld for payment to the bondholders. (See R. 74–75, 77, 83–84.)

The court found that the amount due on the bonds at the time of filing suit was $9,547.33 (R. 43), against which a credit of $1,442.54 was allowed, representing the amount of collections lost by reason of the failure of the bank, and awarded judgment for $8,104.79 (R. 46). This judgment was reversed by the Circuit Court of Appeals, as previously stated.

SUMMARY OF ARGUMENT

I

The jurisdiction of the District Court in cases of the instant nature derives from that provision of the Tucker Act, conferring jurisdiction, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon "any contract, express or implied, with the Government of the United States." *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *North American Transportation and Trading Co.*, 253 U.S. 330. Unless a contract may be implied upon the part of the United States to pay petitioner's claim there is no jurisdiction. Such contract cannot be implied here because (a) the United States did not take any property or right of petitioner, and (b) if it did take any such property or right, it was done in denial of petitioner's rights, and under circumstances negativing an intent to pay.

The United States did not take petitioner's bonds, or assert for its benefit any rights conferred by them. Nor did it take any lien or right created by the bonds in petitioner's favor against the lands. The only lien against the land was that created by by the original assessment, and this was paid in full. The bonds did not constitute a lien against the land. Under the statutes of Idaho, the only lien was that created by the assessment, and the bondholders' rights were dependant upon, and limited by, the assessment. The attempted re-assessment of July 3, 1928, made long after the United States had acquired title to the lands, could create no right or lien against the United States: *United States* v. *City of Buffalo*, 54 F. (2d) 474, certiorari denied, 285 U.S. 550. The fact that petitioner may have been deprived of the remedy of re-assessment under the Idaho statutes because of the acquisition of the land by the United States did not amount to an appropriation of any rights of petitioner. This was merely an incidental frustration from which no implied obligation on the part of the United States can arise, *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *Sanguinetti* v. *United States*, 264 U.S. 146.

II

In order to confer jurisdiction the contract must be one not merely implied in law but one which is implied in fact, founded upon a meeting of minds,

inferred as a fact from the conduct of the parties. *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597; *Alabama v. United States*, 282 U.S. 502; *United States v. Minnesota Investment Co.*, 271 U.S. 212. Such a contract cannot be inferred here. The United States having paid to the owners the full value of the land, and having discharged the liens against it, can hardly be held by implication to have agreed to pay some additional amount to the bondholders. There is no jurisdiction under the Tucker Act in such circumstances. *Alabama v. United States*, 282 U.S. 502; *Ball Engineering Co. v. White*, 250 U.S. 46; *Tempel v. United States*, 248 U.S. 121; *Hill v. United States*, 149 U.S. 593.

III

The six year limitation of the Tucker Act began to run, as to each lot, when the United States acquired title to it. The record does not show the dates of the various purchases, further than that the lands were acquired during the period from 1920 to January 1, 1927. Petition was filed November 25, 1929. The cause of action as to some of the lots at least is barred. The limitation is jurisdictional, and since the record fails to show as to any particular lot that the cause of action arose within the six-year period, petitioner has failed to meet the requirement that the record must affirmatively establish the existence of the necessary jurisdictional facts.

IV

The right of action, if any, accrued to the holder of the bonds at the time the United States acquired the lands. Petitioner did not become the owner of the bonds until 1925, while the lands were purchased during the period from 1920 to January 1, 1927. As to the lands purchased before petitioner became the holder of the bonds the right of action, if any, accrued to the holder of the bonds at that time, and petitioner has no right to sue. A cause of action against the United State cannot be assigned. (R.S. 3477.)

ARGUMENT

The suit is based on the theory that the United States "took" petitioner's bonds, or rights claimed under them. Such suits, if maintainable, are founded upon an implied contract to pay for the property taken, and the jurisdiction of the court to entertain them derives from that provision of the Tucker Act conferring jurisdiction on the District Courts, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded "upon any contract, express or implied, with the Government of the United States." *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *North American Transportation & Trading Company*, 253 U.S. 330. Without a contract there is no jurisdiction, and to give rise to an implied contract

there must be a direct and intentional taking of plaintiff's property, with authority to take and under circumstances from which an intent to pay may be inferred. No contract can be implied in the case at bar because (a) the United States did not take any property or right of petitioner, and (b) if there was a taking it was done in denial of petitioner's claim, and under circumstances negativing an intent to pay.

I

THE UNITED STATES DID NOT TAKE ANY PROPERTY OR RIGHT OF PETITIONER

It is obvious that the United States did not take petitioner's bonds or assert for its use any rights conferred by them. It took or acquired only land, and unless petitioner's bonds created in its favor some right or lien in the land which was taken by the United States by the acquisition of the land, there was no taking of any property of petitioner.

The original assessments, levied to pay the bonds and in effect at the time the United States acquired the land, were paid in full. Did the bonds constitute a lien against the lands in petitioner's favor, independent of and beyond these assessments? The answer must be in the negative. The bonds could not have such effect, unless specifically so provided in the statutes authorizing their issue. *Heine* v. *Commissioners,* 19 Wall. 655, 659; *Lyon* v. *Alley,* 130 U.S. 177, 189. The statutes of Idaho do not so provide; on the contrary, they specifically

provide that the lien is established and limited by the assessment. The Idaho Code provides (pp. 20, 21, *infra*) for the creation of improvement districts, requires that each lot or parcel of land be separately assessed for the full debt thereof in proportion to benefits derived. (Secs. 49-2702, 49-2707.) The assessment when levied shall become a lien upon the land. (Sec. 49-2709.) The Code provides for filing objections to such assessment, authoirzes appeal to the District Court, which shall have power to "confirm, modify or annul the assessment" (Secs. 49-2710, 2711, 2712, 2713, 2714); and the owner of any piece of property may redeem his property from liability by paying the assessment against it (Sec. 49-2721). Each bond shall provide that the principal sum and interest is payable out of the local improvement fund created for the payment of such improvement by such assessments, and not otherwise (Sec. 49-2720). The bondholders' remedy in case of default is to sue for and collect the assessment embraced in any such bond (Sec. 49-2725) and "the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond" (Sec. 49-2727). These provisions limit the bondholders' right as to each parcel of land to the enforcement of the assessment against it, and without such assessments, there is no right or remedy. *New First National Bank* v. *Weiser,* 30 Idaho 15; *Bosworth* v. *Anderson;* 47 Idaho 697. The "bond

merely represents the assessment and creates no new lien or obligation." *Balaam* v. *Pacific States Savings & Loan Co.*, 15 Pac. (2d) 186, 187 (Cal. App.). This Court has said as to similar bonds issued by an Idaho municipal corporation: "It is clear that respondent's faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments." *Moore* v. *City of Nampa*, 276 U. S. 536, 540–541. Nor is the lot owner personally liable for the assessment. The assessment must be made from the lots.

The bonds in suit contain recitals, in accordance with the statutes, that the total costs of the improvement have been duly assessed as special assessments against the lots and parcels of land in the respective improvement districts, that the assessments are a lien against the lots and parcels of land, and that the bondholders' remedy in case of nonpayment shall be confined to the enforcement of the assessment (R. 8–9).

In view of the provisions of the statutes and the express terms of the bonds, it would seem impossible to contend that the bonds created any lien or right against the land in petitioner's favor, other than that of the original assessments. These were paid in full.

The attempted reassessments of July 3, 1928, having been made long after the United States acquired title to the land, could create no right or lien as against the United States (*United States* v.

City of Buffalo, 54 F. (2d) 471 (C.C.A. 2d), certiorari denied, 285 U.S. 550; and this seems to be conceded. Petitioner contends, however, that it has been deprived of its remedy of reassessment provided by the Idaho Code (Secs. 49-2726; 49-2821; *infra*, pp. 30, 31), and that this constitutes a taking of its rights. These provisions authorize and direct the city to make reassessments sufficient to pay for the improvement "whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed" by the property owners. There may be some question whether these provisions were available here, since the record shows that the original assessments were equal to the cost of the improvements, but proved inadequate to pay the bonds and interest for other reasons. But passing this question, the right conferred is merely an inchoate one as against the city, to require it to levy reassessments in the event contemplated by the statutes. Until such reassessment is made, there is no right or lien against the lots or land in the bondholders' favor. *Beezley* v. *City of Astoria*, 126 Ore. 177. At the most, the action of the United States in acquiring the land amounted merely to an incidental frustration of such relief or benefit which petitioner might have obtained under the statutes. There was no appropriation of petitioner's rights by the United States, and no implied obligation on the part of the United States can

arise. *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *Sanguinetti* v. *United States*, 264 U.S. 146.

II

IF THERE WAS A TAKING OF ANY RIGHT OF PETITIONER, THE CIRCUMSTANCES NEGATIVE AN INTENT TO PAY, AND THEREFORE A CONTRACT TO PAY CANNOT BE IMPLIED

In order to confer jurisdiction against the United States on an implied contract, the contract must be one not merely implied in law, on equitable considerations, but one which is implied in fact, founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact from the conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding. *Baltimore & Ohio R.R. Co.* v. *United States*, 261 U.S. 592, 597; *United States* v. *Minnesota Investment Co.*, 271 U.S. 212; *Alabama* v. *United States*, 282 U.S. 502. There was no privity between the United States and petitioner, and no ground upon which a contract between them may be implied *in fact*. The United States paid the lot owners the full value of the lots, and caused all liens existing against them to be satisfied from the purchase price. Under these circumstances it can hardly be implied that the United States agreed in fact to pay some additional amount to the bondholders. The fact that certain sums were withheld from the landowners for a time "for the purpose of protecting the United States" (R. 43) was wholly

consistent with the Government's proceeding under a claim of right.

There is no jurisdiction under the Tucker Act in such circumstances. *Alabama* v. *United States*, 282 U.S. 502; *Ball Engineering Co.* v. *White*, 250 U.S. 46; *Tempel* v. *United States*, 248 U.S. 121; *Hill* v. *United States*, 149 U.S. 593.

III

THE SUIT IS BARRED BY LIMITATION.

The petition alleges a taking of petitioner's "property" by flooding the land on January 1, 1927. (R. 15.) The petition was filed November 25, 1929. (R. 1.) The land was acquired by the United States in various parcels, during the period from 1920 to January 1, 1927. (R. 44–45.) The record does not show the dates of the various contracts or deeds, or show what parcels of land or how many of them were acquired within the six-year period preceding the filing of suit. The "right" or "property" which petitioner claims was taken, was a right, if it existed, to require the city to reassess the amounts due on the bonds of each district, proportionately against each lot of the district on the basis of benefits received, and thereafter to collect such reassessments by foreclosure if necessary. The right was separate and distinct as to each lot, and no lot was liable for the default of any other lot. Such right, if it was taken by the United States, was taken, as to each lot, when the United States ac-

quired title to it, since the lots then became exempt from local taxation, and from liability to reassessment (*United States* v. *City of Buffalo*, 54 F. (2d) 471 (C.C.A. 2d), certiorari denied, 285 U.S. 550). The flooding of the land after the United States had acquired title to it could not affect petitioner's rights in any way. As to some of the land, at least, the suit is barred by the six year limitation of the Tucker Act. Moreover, this limitation is jurisdictional (*Finn* v. *United States*, 123 U.S. 227; *United States* v. *Wardwell*, 172 U.S. 48; *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, 667, and since the record fails to show that the cause of action as to any particular lot arose within the six year period, petitioner has failed to meet the requirement that the record must affirmatively establish the existence of the necessary jurisdictional facts. *Parker* v. *Ormsby*, 141 U.S. 81.

IV

THE RIGHT OF ACTION, IF ANY, IS NOT IN THE PETITIONER

It also appears, as to some of the lots at least, that the cause of action, if any, arose before petitioner became the owner of the bonds, and as to such lots, the right of action, if any, is in the prior holder of the bonds.

Petitioner was incorporated in 1925 (R. 34) and acquired the bonds in the same year (R. 36). The lots were acquired by the United States during the period from 1920 to January 1, 1927. (R. 44–45.)

The right to sue, if any, is in the holder of the bonds at the time the United States acquired title to the lots. *Roberts* v. *Northern Pac. R.R.*, 158 U.S. 1. Any implied contract to pay arose at that time, and with the then holder of the bonds. *Carpenter* v. *United States*, 56 F. (2d) 828 (C.C.A. 2d). A cause of action against the United States cannot be assigned. R.S. 3477; *Brothers* v. *United States*, 250 U.S. 88.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
WILLIAM W. SCOTT,
W. S. WARD,
Attorneys.

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APPENDIX

IDAHO CODE ANNOTATED, 1932 OFFICIAL EDITION

SECTION 56-602 (I.C.S. § 71-[28]). *Consent to purchases by United States—Jurisdiction for execution of process reserved.*—Consent is given to any purchase already made, or that may hereafter be made, by the government of the United States, of any lots, or tracts of land, within this state, for the use of such government, and to erect thereon and use such buildings, or other improvements, as may be deemed necessary by said government; and over such lands and the buildings, or improvements, that are, or may be, erected thereon, the said government shall have entire control and jurisdiction, except that the state shall have jurisdiction to execute thereon all process, civil or criminal, lawfully issued by the courts of this state, and not incompatible with this cession.

SECTION 49-2702 (I.C.S. § 4000). *Bases of assessments.*—The assessment of the cost and expense or any work or improvement provided for in sections 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code shall be assessed upon the abutting, contiguous and tributary lots and lands, and lots and lands included in the improvement district formed, each lot and parcel of land being separately assessed for the full debt thereof in proportion to the number of feet of such lands and lots fronting thereon or included in the improvement district, and in proportion to the benefits derived to such property by said improvement sufficient to cover

the total cost and expense of the work to the center of the street.

SECTION 49-2707 (I.C.S. § 4005). *Ordinance creating improvement district.* By the provisions of such ordinance a local improvement district shall be established, to be called "Local improvement district No. ," which shall include all the property fronting or abutting on, contiguous, or tributary to the street to be improved, between the points named in such resolution or ordinance to the distance back from such street, if platted in blocks to the center of the block; if platted in lots to the center of the lots; and if not platted, to the distance of 125 feet.

Such ordinance shall provide that such improvements shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, or abutting, contiguous or tributary thereto, and included in said improvement district and in proportion to the benefits derived by said improvement: provided, that the city council or trustees may expend from the general fund for such purposes such sums as, in their judgment, may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvement.

SECTION 49-2709 (I.C.S. § 4007). *Lien of assessments—Foreclosure.*—Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accord-

ance with the provisions of the Code of Civil Procedure.

Such suit shall be in the name of the city of ——— (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers.

SECTION 49-2710 (I.C.S. § 4008). *Assessment roll.*—Upon the passage of an ordinance as herein provided, or at such later time as the council or board of trustees may determine, the committee on streets, together with the city engineer, or other proper authority of such municipality, shall make out an assessment roll according to the provisions of said ordinance and shall certify the same to the council or trustees of such municipality.

SECTION 49-2711 (I.C.S. § 4009). *Notice of filing roll—Time to file objections.*—Upon receiving the said assessment roll the clerk of the municipality shall give notice by three successive publications in the official newspaper of such municipality that such assessment roll is on file in his office, the date of filing the same, and said notice shall state a time at which the council or trustees will hear and consider objections to said assessment roll by the

parties aggrieved by such assessments. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may, within ten days from the last publication provided herein, file with the clerk his objections, in writing, to said assessment.

SECTION 49-2712 (I.C.S. § 4010). *Hearing objections—Order thereon.*—At the time appointed for hearing objections to such assessment, the council or trustees shall hear and determine all objections which have been filed by any party interested to the regularity of the proceedings in making such assessment, and the correctness of such assessment, or of the amount levied on any particular lot or parcel of land, and the council or trustees shall have the power to adjourn such hearing from time to time and shall have power, in their discretion, to revise, correct, confirm or set aside such assessment and to order that such assessment be made de novo and such council or trustees shall pass an order approving and confirming such assessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said assessment to the amount thereof levied on each lot and parcel of land.

SECTION 49-2713 (I.C.S. § 4011). *Appeal from order.*—Any person who has filed objections to such assessment or reassessment as hereinbefore provided shall have the right to appeal to the district court of the state and county in which said municipality may be situated.

Such appeal shall be taken by filing a written notice of appeal with the clerk of such municipality within 10 days after such assessment or reas-

sessment roll shall have been approved and confirmed by the council or trustees, and said notice shall describe the property and the objections of such appellant to such assessment, and such appellant shall also file with the clerk of the district court aforesaid, within 20 days from the approval and confirmation of such roll by the council or trustees, a copy of said notice of appeal, assessment or reassessment roll and proceedings thereof, certified by the clerk of such municipality, together with a bond to such municipality, conditioned to pay all costs that may be awarded against the appellant in such sum not less than $200 and with such security as shall be approved by the judge of said court.

SECTION 49-2714 (I.C.S. § 4012). *Trial of appeal.*—The case shall be docketed by the clerk of said court in the name of the person taking the appeal against the municipality as "An appeal from assessments." Said cause shall then be at issue and have precedence over all civil cases pending in said court, except proceedings under the act relating to eminent domain by cities and villages, actions of forcible entry and detainer. Such appeal shall be tried in said court as in the case of equitable causes, except that no pleadings shall be necessary. The judgment of the court shall be either to confirm, modify or annul the assessment in so far as the same affects the property of the appellant, from which judgment an appeal shall lie to the Supreme Court, as in other causes. In case the assessment is confirmed, the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs.

SECTION 49-2715 (I.C.S. § 4013). *Special assessments for improvements—Collection.*—All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.

SECTION 49-2716 (I.C.S. § 4014). *Bonds—Issuance to cover instalment payments.*—Whenever the mayor and council or trustees of any municipality shall, under authority vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be sidewalked, graded, curbed, planked, graveled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years from and after the date of issue of such bonds, and shall bear interest not ex-

exceeding seven per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees: provided, however, that when such bonds are issued for further, separate or additional improvement by paving street or streets, or highways that have theretofore been graded, curbed or graveled only, under the provisions of this chapter, then such bonds shall be a subsequent lien upon the property subject to assessment for such improvement, to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement of grading, curbing, or graveling of such street or streets or highway: provided further, that the grading, curbing or graveling of street, streets, or highways, only and thereafter the paving of said street, streets or highways as shall have theretofore been graded, curbed, or graveled, as allowed and contemplated by provisions of this chapter, shall not be construed or understood as one of the same improvement, or for the same purpose or for one or the same benefit, or as a double assessment for improvements against the property to be assessed for the payment of the costs and expenses of such improvement, but shall be considered and construed as separate, distinct, single and independent improvements and benefits, to such street, streets, or highways and the property assessed for the payment of the costs and expenses thereof. And all assessments levied or bonds issued for the payment of either or each of such improvements, shall be considered and construed as assessments levied or bonds issued for separate, distinct, single, and

independent improvements and benefits on and to such street, or streets, or highways, and the property assessed for the costs and expenses of such improvement.

SECTION 49 2717 (I.C.S. § 4015). *Disposal of bonds. Interim warrants.* Such bonds may be issued to the contractor constructing the improvement in payment thereof, or the mayor or council or trustees or other authorized officers of said municipality may sell the same at not less than their par value net, and pay the proceeds thereof to the contractor. If the council or trustees shall determine to issue and sell said bonds, they may, for the purpose of meeting the expense of making said improvements as the same are installed prior to the sale of said bonds, issue warrants against the improvement district, payable to the contractor or other proper person, upon estimates of the city or village engineer, bearing interest at the rate of not to exceed 7 per cent per annum, which warrants, together with the interest due thereon at the date of the issuance of said bonds, shall be redeemed and retired by the proceeds of the sale of said bonds.

SECTION 49 2718 (I.C.S. § 4016). *Maximum bond issue. Interest coupons.* Such bonds shall not be issued in excess of the contract price and expense of such improvement, including engineering and other clerical service, advertising, cost of inspection, cost of collecting assessments, and interest upon warrants, if issued as aforesaid, and the instalment coupons shall include annual interest on such instalments to the maturity thereof. The bonds shall be of such denomination as the council or trustees shall deem proper.

SECTION 49-2720 (I.C.S. § 4018). *Form of bonds.*—Such bonds shall be numbered from one upward, consecutively, and each bond and coupon shall be signed by the mayor, or the chairman of the board of trustees, countersigned by the city or village treasurer, and attested by the clerk of such municipality: provided, however, that such coupons may, in lieu of being signed have printed thereon the facsimile of the signature of said officers, and each bond shall have the seal of such municipality affixed thereto, and shall refer to the improvement district for the payment of which the same shall be issued. Each bond shall provide that the principal sum therein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise.

SECTION 49-2721 (I.C.S. § 4019). *Payment of instalments by owner.*—The owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his property, upon the municipal clerk having published a printed notice in the official newspaper of the municipality for 10 consecutive days, or three consecutive weekly issues, which notice shall state the time for payment to begin and the time for payment to close, the last day of said notice to be not less than 30 days before the issuance of the bonds, or, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of the unlevied instalments with interest on the latter at the rate provided in the bonds from the date of the issuance of the bonds to the time of the maturity of the last

instalment. In all cases where instalments of the assessments are not yet levied and paid as above provided, whether before or after the issuance of the bonds, the same shall be paid to the clerk, who shall receipt therefor, and all sums so paid shall be applied solely to the payment of the cost and expense of such improvements or the redemption of the bonds issued therefor.

When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvements except as hereinafter provided.

SECTION 49-2725 (I.C.S. § 4023). *Bondholders' rights and remedies.*—Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to

collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land.

SECTION 49-2726 (I.C.S. § 4024). *Reassessment of benefits.* In all cases of special assessments for local improvements of any kind against any property, persons or corporations whatsoever, wherein said assessments have failed to be valid in whole or in part for want of form or sufficiency, informality, irregularity or nonconformance with the charter provisions or laws governing such assessments, the city council or trustees or other authorized board or body shall be, and they are hereby, authorized to reassess such special taxes or assessments and to enforce their collection, in accordance with the provisions of law existing at the time the reassessment is made.

Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful,

and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy.

SECTION 49-2727 (I.C.S. § 4025): *Application of bonding provisions.*—Nothing shall be construed as repealing or modifying any existing manner and method for cities of the first class, or those organized under special or local laws, to make improvements as hereinbefore provided for, but shall be construed as an additional and concurrent power and authority. Any city whose charter provides for the issuance of bonds for local improvements, payable only from the proceeds of special assessments, is hereby authorized to issue such bonds in the manner and with the effect provided in this chapter, and the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond.

SECTIONS 49-2801 to 49-2831 (I.C.S. §§ 4121–4151) relate to sewer improvements and are to similar effect as the sections set out above.

SECTION 49-2821 (I.C.S. § 4141) provides for reassessments as to sewerage improvements, and is as follows:

> In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregu-

larity, or nonconformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or board shall be, and they are hereby authorized to reassess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment was made.

Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1933.

The John K. & Catherine S. Mullen Benevolent Corporation, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 6, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

This action was brought in the District Court for Idaho, under the Tucker Act, to recover a balance due on improvement district bonds issued by the village of American Falls, Idaho, for sidewalk and sewer construction. The theory of the petitioner, holder of the securities, was that the liability of the United States arose out of its acquisition of land in the districts for the construction of the American Falls reservoir under the authority of the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388). The Circuit Court of Appeals reversed a judgment in petitioner's favor, and the case was brought here by certiorari.

In 1915 and 1916 the village (now city) of American Falls duly created local improvement districts Nos. 1 and 2 for the construction of sewers, and local improvement district No. 8 for the laying of sidewalks, authorized bond issues to finance the work, and levied against the several parcels of land in the districts assessments totaling an amount calculated to suffice for the payment of principal and interest of the bonds. All of the bonds of the three districts were purchased from the village by J. K. Mullen, who in 1925 transferred to the petitioner certain of the bonds of each district. Beginning in 1920 the respondent acquired all the real property within the three districts for the construction of the reservoir. In some cases title passed by condemnation, but in most instances by deeds from the then owners. The acquisition was completed prior to January 1, 1927. As title to each lot was obtained the United States paid or caused to be paid all existing

assessments against the lot. There was general knowledge prior to 1927 that the total of the assessments would be insufficient to pay all the bonds. The petitioner asserts and we may assume that statutory authority exists, in case of a deficiency arising from causes shown by the record, to re-assess the property within the districts for the amount of the deficiency. By ordinances enacted July 3, 1928, and proceedings pursuant to them, the city re-assessed all the land within the districts. But as the land was then owned by the United States, the assessment was a nullity. *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151. At some time between 1920 and January 1, 1927, the agents of the Government responsible for the acquisition of the reservoir site learned that the original assessments were insufficient to pay the outstanding bonds. This knowledge led them to require vendors to leave part of the purchase price on deposit with the United States pending determination of the Government's liability for probable re-assessments. Subsequent to the institution of the present suit these officials, apparently upon advice that assessments made after the conveyances could not affect the title of the United States, caused the moneys so withheld to be paid to the vendors. The total so retained and ultimately paid over was in excess of the amount due upon the petitioner's bonds.

The petitioner argues that the bonds were property and were taken by the respondent and, in the alternative, that they were liens, actual or inchoate, on the realty, and as the lien could not be foreclosed against lands owned by the United States, the respondent's acquisition of the lots destroyed the value of the securities and gave rise to an implied promise to pay the sums remaining due to the bondholders. The respondent replies that the bonds were not taken, were not liens upon the real estate acquired, but only upon the existing assessments, or to the amount of these assessments, all of which were cleared from the land at the time of the conveyances to the Government; the United States recognized no lien of the bonds upon the tracts in question and made no contract express or implied to pay the bonds or any future assessments; suit was not brought within the time limited by the Tucker Act; the cause of action, if any, was in Mullen, the owner of the bonds at the time title passed to the United States, and R. S. 3477 forbids assignment to the petitioner. An understanding of the status of the bonds and the rights of their owner as re-

spects the real property in the improvement districts is necessary to a solution of some of the questions presented.

The Idaho statutes provide for the creation by municipal action of improvement districts for constructing public works of the character with which we are here concerned (Idaho Compiled Statutes, 1919, §§ 3999-4151, inclusive*). The first step is an ordinance declaring the intention to create the improvement, describing the section to be improved, estimating the cost, and declaring that the cost is to be assessed against the contiguous property (§ 4003). Protests may be made and are to be heard and considered, and thereafter an ordinance is passed creating the district and providing for the improvement and for taxation and assessment of the cost upon all parcels of land within the district, in proportion to benefits (§ 4005). "Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands," . . . (§ 4007). The municipality may provide for payment by instalments instead of levying the entire assessment at one time, and in that case may issue in the name of the municipality improvement bonds of the district payable in instalments within ten years (§ 4014). Provision is made for annual levies to meet instalments and interest (§ 4017), for the form of the bonds (§ 4018), and for the redemption of their lots by the respective owners. If so redeemed the property affected is not thereafter to be liable for further special assessments for the same improvement except as in § 4024 provided (§ 4019). Re-assessment on all the property in the district is permitted by § 4024, "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made", ... It was under this section that the re-assessments were made in the instant case.

The municipality is not liable for the amount of the bonds (§ 4026). Its only duty is to collect the assessments and place them in a separate fund set apart for payment of principal and interest. In fulfilment of this obligation the city may bring suit to recover out of each lot the amount of any assessment against it (§ 4007), and if the municipality fails or neglects to collect

*Reference will be made only to the sections dealing with sidewalks, &c., since those applicable to sewers are of similar import.

the bondholder may proceed to do so in his own name, and may foreclose the lien of the assessment (§ 4023). The section provides that the bonds "shall transfer to the . . . owner or holder, all the right and interest of such municipality *in and with respect to every such assessment,* and the lien thereby created against the property of such owners assessed", and shall authorize the holder "to receive, sue for and collect, or have collected such assessment embraced in any such bond" . . . . The bonds are to provide that the principal sum and interest is payable out of the local improvement fund created for the making of the improvement by assessment, and not otherwise (§ 4018), and "the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond" (§ 4025). The lot owner is not personally liable for the assessment.

The bondholder is in equity the owner of the assessment fund and as the real party in interest may, in event of the city's default in collection, enforce the city's right to collect the assessment out of the land. The bonds have no general lien upon the lands in the district and save through the assessment no special lien on any tract. *New First Nat. Bank* v. *City of Weiser,* 30 Idaho 15, 22.

The petitioner insists that the bonds are property and were in legal effect taken by the respondent. The argument is that the sole source of payment was a re-assessment upon the lots in the improvement districts, and as the action of the respondent rendered such procedure vain, the United States as effectually destroyed the chose in action as if it had seized the instruments evidencing the right. But the bonds were not taken. At the date of acquisition by the Government the real estate was subject to be assessed in the future for sundry taxes, amongst them taxes in the nature of re-assessments for sewers and sidewalks. It is true these could not thereafter be levied on property which had passed to the United States, but this does not mean that the Government appropriated the right to assess them *in futuro,* nor that it took the benefit which might accrue to bondholders consequent on such future levies. By purchase of the lands the United States at most frustrated action by the city to replenish the assessment fund to which alone the bondholder must look for payment of his bonds.

But this was not a taking of the bondholder's property. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502.

What has been said shows that the respondent did not take or destroy any lien belonging to the petitioner. None remained upon the land, when the purchases were consummated. The re-assessments were the result of proceedings begun thereafter. They were ineffective to create a lien upon lands owned by the Government. *United States* v. *City of Buffalo,* 54 F. (2d) 471.

The respondent did not expressly contract with the petitioner to make good any unpaid balance on the outstanding bonds. Can an implied contract of that nature be spelled out of the acts of the Government's agents? We think not. Care was taken to free the lands of all liens, including the assessments then unpaid. The vendors were under no legal liability at the date of transfer for any future re-assessments. *United States* v. *City of Buffalo* (*supra*); *Brown* v. *Silverton,* 97 Ore. 441; *Beezley* v. *Astoria,* 126 Ore. 177, 184. The withholding of a portion of the purchase-money pending an investigation of the possibility that the realty would be liable for a re-assessment, falls far short of indicating that the Government intended to pay the bondholders if it should develop that no lien existed at the date of acquisition. A purpose to pay only valid subsisting liens negatives an agreement to pay something which had no such character. Compare *Tempel* v. *United States,* 248 U. S. 121; *Alabama* v. *United States,* 282 U. S. 502.

These views render unnecessary discussion of the contentions with respect to the timeliness of the suit and the assignability of the cause of action.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.